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The Wolf at the Campfire: Understanding Confidential Relationships

Roy Ryden Anderson

Southern Methodist University, Dedman School of Law, rranders@smu.edu

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THE WOLF AT THE CAMPFIRE: UNDERSTANDING CONFIDENTIAL RELATIONSHIPS

Roy Ryden Anderson*

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THIS article attempts to sharpen perspective on the concept of "confidential relationship" as a basis for extending equity jurisdiction. The concept is not new. The courts in this country began over a hundred years ago to hold that equitable remedies, and the attendant concepts of *uberrima fides*, full disclosure, and the avoidance of conflict of interest, apply not only to formal fiduciary relationships, such as trustee-beneficiary, attorney-client, doctor-patient and the like, but also

* Vinson & Elkins Distinguished Teaching Fellow and Professor of Law, Southern Methodist University. B.A. 1966, Texas Christian University; J.D. 1969, Southern Methodist University; LL.M. 1975, Yale University. I am grateful for the Faculty Excellence Fund providing a research grant in support of this article. I especially thank Barbara Anderson, Maureen Armour, Alan Bromberg, Don Clifford, David Deaton, Alvin Golden, David Harrell, Fred Misko, Joel Mohrman, Walter Steele, Marc Steinberg, and Peter Winship for their insights. I also thank my research assistant, Paul Kirkpatrick, for his extraordinary help in its research and preparation.

to a wide variety of others, which the courts labeled "confidential relationships." The development of the doctrine defining this concept and its boundaries has been largely uniform among the jurisdictions. However, the doctrine has typically been so broadly stated that it carries very little substantive content. If the words of the courts are to be taken literally, a confidential relationship giving rise to fiduciary obligation may include any business, social, or purely personal relationship in which one party justifiably places trust and confidence in another to care for his or her welfare and interests.¹ But the breadth of these statements is seriously misleading if unaccompanied by a guiding context.²

1. See, e.g., *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Liebergessell v. Evans*, 613 P.2d 1170, 1176 (Wash. 1980) ("A fiduciary relationship arises as a matter of law between an attorney and his client or a doctor and his patient, for example. But a fiduciary relationship can also arise *in fact* regardless of the relationship *in law* between the parties."); *Adickes v. Andreoli*, 600 S.W.2d 939, 946 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ dismissed) ("A confidential relationship may arise not only from the technical relationships, but may also arise informally from moral, social, domestic, or purely personal relationships."). See generally RESTATEMENT OF CONTRACTS § 472, cmt. c (1932):

A fiduciary position . . . includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business adviser, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.

2. The necessary context involves much more than dominance by one party wrongfully exercised over the other, although the courts often emphasize the dominance factor when discussing confidential relationships. Dominance, in itself, connotes nothing more than power; it is the big over the little, the strong over the weak, the master over the servant. When that power is abused, the law is well equipped to police that abuse under a variety of doctrinal rubrics which, in the current vernacular, it labels generally "unconscionability." In confidential relationships, however, dominance is the necessary result of a trust and confidence reasonably reposed. It is the consequence of the reposing of trust. If the trust was reasonably conveyed, the conveyance does give rise to a dominance, the abuse of which represents a violation of the trust and the breach of the confidential relationship. Without the abuse, there is no breach of the relationship. The dominance, and the abuse thereof, is thus a necessary concomitant of the breach, but not of the relationship itself. Even where the dominance itself exists prior to the reposing of trust, the dominance merely furnishes the basis for the reasonableness of the reposing of trust. It is not an independent element of the relationship itself, and the resulting dominance says no more than that the party in whom the trust is reposed was able to abuse that trust and to do what he wrongfully did. This dominance also largely explains why the plaintiff did not prevent the abuse. But it is understandable, given the necessary interrelation between trust and dominance, that the courts in confidential relationship cases sometimes erroneously focus on the consequence rather than the cause. See, e.g., *In re Estate of Beal*, 769 P.2d 150, 155 (Okla. 1989) (in a confidential relationship "on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed;" a confidential relationship is one "where there is weakness on one side and strength on the other resulting in dependence or trust justifiably reposed in the stronger"); *Mitchell v. Smith*, 779 S.W.2d 384, 389 (Tenn. Ct. App. 1989) (confidential relationship is any relationship which gives one person dominance and control over another); see also *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977). Better-reasoned decisions give primacy to the reposing of trust rather than to the resulting dominance. See *Apple v. Apple*, 95 N.E.2d 334, 337 (Ill. 1950) ("A confidential or fiduciary relationship exists in all cases where trust and confidence are reposed in another who thereby gains a resulting influence and superiority."); *Iacometti v. Frassinelli*, 494 S.W.2d 496, 499 (Tenn. Ct. App. 1973) (a confidential relationship is one "where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with ability, because of the confidence, to influence and exercise dominion over the weaker or dominated party."). The significant majority of decisions do emphasize the necessity of a trust and confidence, reasonably reposed, and treat the result-

Determining the existence of a confidential relationship is further complicated by the general rule that the determination is a question of fact. Indeed, confidential relationships have been labeled "fact-based" fiduciary relationships to distinguish them from formal ones.³ Ostensibly this represents an extraordinary abdication by the equity chancellor of its authority to determine when equity jurisdiction will intervene.

The analysis that follows will demonstrate that, judicial rhetoric notwithstanding, the concept of confidential relationship as a means for invoking equity jurisdiction applies to only a narrow range of human relationships. In actuality, although these relationships are indeed "fact-based," the trier of fact plays but a small part in determining their existence. The chancellor has in fact relinquished little discretion.

I. FIDUCIARY OBLIGATION

The essence of a confidential relationship is fiduciary obligation.⁴ It is the extraordinary nature of this obligation that necessitates the rarity of confidential relationships. Fiduciary obligation is the highest order of duty imposed by law. In the relationship with the principal, the *beneficiary* of the relationship, the fiduciary must exercise utmost good faith and candor, must disclose all relevant information, and must not profit from the relationship without the knowledge and permission of the principal. The fiduciary must make every effort to avoid having his own interests conflict with those of the principal, and, when conflict is unavoidable, the fiduciary must place the interests of the principal above his own. These principles are both basic and uncompromising. Cardozo trenchantly expressed the matter as follows:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned

ing dominance as the implicit result. See *In re Estate of Beal*, 769 P.2d at 155 ("In each case [finding a confidential relationship] we have looked at the facts and found a relationship which would allow a reasonably prudent person to repose confidence in the other."); *Capriulo v. Bankers Life Co.*, 344 S.E.2d 430, 432 (Ga. Ct. App. 1986) ("The showing of a relationship *in fact* which justifies the reposing of confidence by one party in another is all the law requires.").

3. See Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 301 (1989) (footnotes omitted):

The question—who is a fiduciary?—is answered very simply or only after a detailed examination of the facts. It is simply answered if the relationship falls within the nominate categories deemed to be fiduciary Other relationships may exceptionally involve a trust equivalent to or stronger than even the closest relationship between, for example, a solicitor and a client These are 'fact-based' fiduciary relationships.

4. And vice versa. See *Fipps v. Stidham*, 50 P.2d 680, 683 (Okla. 1935) ("Confidential and fiduciary relations are in law synonymous, and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.").

to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.⁵

The proposition of placing the interests of another on par with—or even in ascendancy to—one's own is so extraordinary to human experience that it is both understandable and laudable that law and equity have been most reticent to impose the obligation. Its imposition has been reserved to a handful of formal fiduciary relationships and to the occasional *confidential relationship*. Notwithstanding the narrowness of this reservation, the courts have, nevertheless, painted their descriptions of confidential relationships most broadly. There is good reason for this given the extraordinary variety of illicit human conduct. The purpose is to cast the net broadly but to limit the "catch" to only the most deserving of situations.⁶ For this reason, determining the existence of a confidential relationship must always be intensely fact-based. But it is only the most extraordinary of fact patterns that will give rise to a finding of a confidential relationship.⁷ The onerous nature of fiduciary obligation necessitates

5. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

6. See *Page v. Clark*, 592 P.2d 792, 798 (Colo. 1979) ("confidential relationship may arise from a multitude of circumstances"); *Egr v. Egr*, 131 P.2d 198, 201 (Or. 1942) ("Equity will never bind itself by any hard and fast definition of the phrase confidential relation"); *In re Null's Estate*, 153 A. 137, 139 (Pa. 1930) ("No precise language can define the limits of the [confidential relationship]"); *Robinson v. Robinson*, 517 S.W.2d 202, 206 (Tenn. Ct. App. 1974) (confidential relationship can assume a variety of forms and thus courts have been reluctant to define such relationships precisely); *Castaldo v. Castaldo*, No. SPBR 9412-28656, 1995 WL 476798, at *8 (Conn. Super. Ct. July 12, 1995) ("There is no bright line test as to what is or is not a special or confidential relationship 'But equity has carefully restrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations.'", quoting *Harper v. Adametz*, 142 Conn. 218, 225 (1955)); *Weisblatt v. Minnesota Mutual Life Ins. Co.*, 4 F. Supp. 2d 371 (E.D. Pa. 1998) ("It is impossible to define precisely what constitutes a confidential relation," quoting 3 GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 482 at 86 (1946): "Equity will never bind itself by any hard and fast definition of the phrase 'confidential relation'"); *United States v. Reed*, 601 F. Supp. 685, 704 (S.D.N.Y. 1985) ("[T]he common law has in fact always defined [confidential relationship] with deliberate imprecision and perhaps surprising expansiveness" (quoting Coffee, *From Tort to Crime*, 19 AM. CRIM. L. REV. 117, 150 (1981))).

Similarly, the law defines fraud broadly. The reason has been wonderfully stated as follows:

Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit. Accordingly definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.

Stonemets v. Head, 154 S.W. 108, 114 (Mo. 1913) (citations omitted).

7. A "confidential relationship" is, however, readily distinguishable from a "special relationship" that will give rise only to a tort duty of good faith and fair dealing. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." A similar provision is codified by § 1-203 of the UNIFORM COMMERCIAL CODE. Over the past quarter century, a great deal of litigation across the country has addressed the issues

that it will not be lightly imposed.

II. THE NATURE OF CONFIDENTIAL RELATIONSHIPS

When justification exists for reposing the extraordinary trust and confidence that gives rise to a confidential relationship, the reason is usually apparent and persuasive. Unless the facts sustaining the alleged justification are themselves in controversy, there is little function for the trier of fact in these clear-cut confidential relationship cases except to validate the trial judge's own unspoken assessment. Given the extraordinary burden of fiduciary obligation, it is understandable for the trial judge to want her own assessment validated by the jury. Thus, many clear-cut confidential relationship cases probably go to trial on the issue even though in retrospect they could have been decided by summary judgment. It is only in cases in which the evidence that would sustain the alleged relationship is controverted, or in which the reasonableness of the trust and confidence allegedly reposed is at issue, that the jury should play a key role in determining the existence of a confidential relationship or lack thereof. Regardless, far too many cases go to trial on the issue when the factual allegations, even if uncontroverted, do not support the relationship. The issue should have been decided by the trial court by summary judgment. This is apparent from reading the plethora of appellate-level decisions sustaining a trial court's correction of its own error by entering a judgment notwithstanding a jury's finding of a confidential relationship, or

of when the duty of good faith arises and the parameters of the duty when it does arise. Much of the litigation has centered on employment and franchise contract cases, as well as contracts covered by the Uniform Commercial Code. Helpful analyses of this developing area of the law may be found in: Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). Many courts have limited the good faith obligation to contracts in which there is a "special relationship" between the parties, a relationship that gives rise only to obligations of good faith and fair dealing, but not to the full panorama of fiduciary duties. A leading case is *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983). One court succinctly distinguished the fiduciary obligations arising from "confidential relationships" from the good faith duty arising from "special relationships" as follows:

Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.

Crim Truck & Tractor Co. v. Navistar Int'l Transp. Co., 823 S.W.2d 591, 594 (Tex. 1992). The fiduciary obligation arising from a confidential relationship will always encompass the duty of good faith and fair dealing characteristic of special relationships, but the converse is not true.

where, even worse, the appellate court has reversed a trial court's affirmation of the jury's verdict. The natural reaction is to question why the issue ever went to trial and why the trouble, time and expense of trial and appeal were not avoided early on. The reason, in part, is undoubtedly attributable to the broad doctrinal strokes used by our courts in describing the nature of a confidential relationship.

These matters are well illustrated by the recent decision of the Supreme Court of Texas in *Schlumberger Technology Corp. v. Swanson*.⁸ This was a suit by the Swansons alleging that Schlumberger had misrepresented the value of a joint venture to mine diamonds when it bought out the Swansons' interest in the venture. Schlumberger defended on the basis of a claims release signed by the Swansons as part of the buy-out agreement. The Swansons sought to invalidate the release alleging, *inter alia*, that a confidential relationship existed between the Swansons and Schlumberger and that the latter had violated its fiduciary duties by making misrepresentations regarding the value of the venture and by failing to disclose the true value. However, the Swansons presented no evidence of any prior fiduciary relationship between the parties or of any other basis for a finding of a confidential relationship, other than their own subjective trust in Schlumberger. Nevertheless, the trial court allowed the issue of a confidential relationship to go to the jury, and the jury found in favor of the relationship. The trial court then entered judgment notwithstanding the jury's verdict. The trial court's judgment was affirmed by the Supreme Court of Texas. But even so, in its affirmation the court described the nature of a confidential relationship with the typically broad language:

An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one. But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. In order to give full force to contracts, we do not create such a relationship lightly.⁹

In determining the issue, the second two sentences in the Court's statement are more important than the first. However, it is understandable that a lay jury would not so perceive the matter were it so instructed. The jury obviously did believe that the Swansons trusted Schlumberger. Business associates as a rule do trust one another; it is often a core reason they have chosen to do business. However, it is one thing to trust someone to deal honestly and quite another to trust someone to put one's interests above his own. Extraordinary facts are necessary to make this latter kind of trust plausible and reasonable.¹⁰ The Swansons simply

8. 959 S.W.2d 171 (Tex. 1997).

9. *Id.* at 176-77 (citations omitted).

10. Undoubtedly, error could often be avoided were trial courts to instruct juries along these lines, but they apparently typically do not. See *Hoover v. Cooke*, 566 S.W.2d 19, 27 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) ("[T]he tendency of the courts is to construe the facts presented liberally in favor of the confider against the confidant in deter-

presented no facts that would justify unbridled faith and confidence in Schlumberger. But little in the court's description would have alerted the uninitiated jurors to make this fine distinction.

It is not only the sweeping language used by the courts in describing confidential relationships that causes confusion in determining their existence, but also the various overlapping bases for invoking equity jurisdiction and the disparate reasons resort to that jurisdiction is sought. During the first half of this century, our courts began to extend the availability of equitable remedies beyond the traditional cases involving breach of a formal or informal fiduciary obligation to include almost any kind of case in which a wrongdoer had profited from illicit conduct. These cases represented an extension of the customary legal restitutionary remedy of quasi contract in that they allowed use of equity's tracing mechanisms to follow the money or property wrongfully taken into its proceeds. The equitable remedies of constructive trust and equitable lien could then be used against those proceeds for the purpose of ensuring that the wrongdoer did not profit from his wrong. The result of this extension of equity jurisdiction was to blur for all time the historical distinction between the legal remedy of quasi contract and the equitable remedies of equitable lien and, particularly, constructive trust. In time, many courts began to erase entirely the distinction by holding that plaintiffs were entitled to the remedy of constructive trust or equitable lien in cases in which there was no breach of a formal or informal fiduciary obligation, nor any other wrong by the defendant other than having acquired money or property of the plaintiff with no legitimate reason for retaining it.¹¹ Equity had invaded

mining whether a confidential relationship exists . . ."); *Peckham v. Johnson*, 98 S.W.2d 408, 416 (Tex. Civ. App.—Fort Worth 1936) (a confidential relationship includes "every form of relation between parties wherein confidence is reposed by one in another, and he relies and acts upon the representations of the other and is guilty of no derelictions on his own part"), *aff'd*, 120 S.W.2d 786 (Tex. 1938); *Higgins v. Chicago Title & Trust Co.*, 143 N.E. 482, 484 (Ill. 1924) (confidential relationship "exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. It may be moral, social, domestic, or merely personal."); *Hoge v. George*, 200 P. 96, 102 (Wyo. 1921) (test for confidential relationship is whether "there was confidence reposed on the one side and accepted on the other, with a resulting dependence by the one party and influence by the other.").

The following broad jury instruction is apparently typical in confidential relationship cases: "You are instructed that the term 'confidential relationship,' as used above, means a relationship where one person trusts and relies on another, whether the relationship is moral, social, domestic, merely a personal one, or grows out of a family situation." *Hamblet v. Coveney*, 714 S.W.2d 126, 129 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

In *Tuck v. Miller*, 483 S.W.2d 898 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.), the trial court instructed the jury that by a confidential relationship: ". . . is meant every form of relationship between parties wherein confidence and special trust is reposed by one in another and he or she is justified in placing such trust and confidence in such other party, and relies upon such other party to protect his or her interest." *Id.* at 905-06.

11. For a discussion of the erosion of the boundaries between law and equity with respect to the remedies of quasi contract and constructive trust, see 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.4 (1978); see also *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex. 1951) (emphasis added):

the former exclusive province of quasi contract.¹² In these cases, for the practical purpose of disgorging an unjust enrichment, quasi contract and constructive trust were treated synonymously. A similar development has occurred in unjust enrichment cases where the plaintiff has alleged, perhaps as an alternative means of redress, the abuse by the defendant of a confidential relationship with the plaintiff. Thus, it is not uncommon to find cases in which the court finds in favor of the existence of a confidential relationship to disgorge an unjust enrichment without analysis of the facts supporting the relationship, and, indeed, where the evidence does not support it.

In this same vein, the *Restatement of Restitution* suggests that, where a transferee of property orally agrees to hold the property for the transferor or to return it on demand, "there is *in this very fact* a sufficient relation of confidence thereby created to justify imposing a constructive

While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, *and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it.*

Id. at 261 (quoting 54 AM. JUR. TRUSTS § 225 (1961)) (emphasis added).

12. For a very helpful little book that traces, with regret, the expansion of equity jurisdiction over the first half of this century, see JOHN P. DAWSON, UNJUST ENRICHMENT (1951). Regarding the use of constructive trust in cases where a money judgment at law based on quasi contract would have served just as well, Professor Dawson opined: "Without much conscious purpose or plan we have created this shambling creature. It is time to fence it in." *Id.* at 33; *see also* *In re Goldberg*, 168 B.R. 382, 384 (B.A.P. 9th Cir. 1994) (under California law, a wrongful act giving rise to constructive trust need not amount to fraud or intentional misrepresentation; all that must be shown is that acquisition of property was wrongful and that defendant's keeping of property would constitute unjust enrichment); *Rollins v. Metropolitan Life Ins. Co.*, 863 F.2d 1346, 1354 (7th Cir. 1988) ("A constructive trust may be invoked even where the unjustly enriched party is completely blameless."), *overruled on other grounds by Metropolitan Life Ins. Co. v. Christ*, 979 F.2d 575 (7th Cir. 1992); *Zeigler v. Cardona*, 830 F. Supp. 1395, 1398-99 (M.D. Ala. 1993) (under Alabama law, "[a] constructive trust may be imposed on life insurance proceeds even though the designated beneficiary is not guilty of fraud or wrongdoing . . . constructive trust may be imposed to prevent unjust enrichment, without regard to actual fraud."); *Adams v. Jankouskas*, 452 A.2d 148, 152 (Del. 1982) (holding that a constructive trust is imposed when defendant's conduct "causes him to be unjustly enriched at the expense of another to whom he owed some duty."); *Fuller v. Fuller*, 606 P.2d 306, 309-10 (Wyo. 1980) (constructive trust is imposed to prevent unjust enrichment and may arise even though acquisition of property was not wrongful); *Easterling v. Ferris*, 651 P.2d 677, 680 (Okla. 1982) ("The primary reason for imposing constructive trust is to avoid unjust enrichment against" party who holds property which he ought not to hold); *Annon v. Lucas*, 185 S.E.2d 343, 352 (W. Va. 1971) (constructive trust imposed even though property was originally acquired without fraud or wrongdoing so as to avoid unjust enrichment); *Hercules v. Jones*, 609 A.2d 837, 841 (Pa. Super. Ct. 1992) ("The controlling factor in determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment."); *Spieß v. Schumm*, 448 N.W.2d 106, 108 (Minn. Ct. App. 1989) (constructive trust may be imposed when it is necessary to avoid unjust enrichment, and wrongdoing by party holding property is not necessary). Although imposing the equitable remedy of a constructive trust to prevent unjust enrichment, notwithstanding the lack of wrongdoing, is perhaps a developing trend in the law, most cases do continue to require additionally that the property upon which the constructive trust is to be imposed was acquired by fraud or violation of a fiduciary or confidential relationship.

trust upon him if he breaks his promise.”¹³ In this way, confidential relationship becomes a surrogate for other bases for invoking equity jurisdiction, such as unjust enrichment, fraud, or other wrong.¹⁴ In many cases, of course, the fraud or other wrongdoing is coupled with clear evidence of a confidential relationship. For example, in *Tuttlebee v. Tuttlebee*,¹⁵ a sister-in-law brought action against her brother-in-law for cancellation of two deeds. It had been the sister’s desire to leave the property to the defendant upon her death. The brother suggested that she deed the property to him and reserve a life estate in herself. He advised her that this would accomplish her desire and protect his interest in the event that another family member decided to contest her will. The deeds that he persuaded her to sign, however, conveyed a full fee simple title to the brother-in-law. In canceling the deeds, the court found that the brother-in-law’s fraudulent misrepresentation of the effect of the deed wrongfully denied the sister the opportunity to make a future testamentary disposition of the property. The court further opined that a confidential relationship existed between the parties based on his having taken care of her for three years after the death of her husband by performing work around the house and acting as her chauffeur. The court emphasized that, at the time of the conveyance, she was eighty-two years of age, had poor eyesight, and was otherwise physically infirm.

Finally, a curious anomaly deserves mention. The fiduciary obligation sought to be imposed may itself be determinative of whether a confidential relationship will be found to exist. On identical facts pertaining to the relationship, a court may find a confidential relationship for the purpose

13. RESTATEMENT (FIRST) OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 182 cmt. c (1937) (comment on clause (b)) (emphasis added). Clause (b) provides:

Where the owner of an interest in land transfers it inter vivos to another upon an oral trust in favor of the transferor or upon an oral agreement to reconvey the land to the transferor, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the transferor, if . . . (b) the transferee at the time of the transfer was in a confidential relation to the transferor.

Id. § 182(b).

The Comment does, however, candidly admit that “some courts require additional evidence of confidence in the relation between them before imposing a constructive trust. *Id.* § 182 cmt. c.

14. A case in point is *Rumfield v. Rumfield*, 324 S.W.2d 304 (Tex. Civ. App.—Amarillo 1959, writ ref’d n.r.e.). In that case, an 80-year-old illiterate man unwittingly deeded land to his nephew after the nephew told him he was only signing a will that was completely revocable. The court granted a judgment for cancellation of the deed, a remedy clearly justifiable at law for fraud *in factum*. See *id.* at 306. Nevertheless, the court justified its decision instead on the basis of a confidential relationship between the uncle and nephew. The court pointed to the testimony of several disinterested parties stating that after visiting the uncle for only a short period of time in the hospital, the nephew was able to persuade him knowingly to sign a will and a permit to allow the nephew to write checks on his bank account, as well as to sign the deed unknowingly. See *id.* at 307. This evidence, however, speaks directly to only the wrongdoing of the nephew and, only by strained implication, to his relationship to his uncle.

15. 702 S.W.2d 253 (Tex. App.—Corpus Christi 1985, no writ).

of disgorging unjust enrichment whereas it would find against such a relationship if the plaintiff has not been enriched but some other reason is presented for invoking equity, such as shifting the burden of proof to the defendant¹⁶ or avoiding the statute of frauds¹⁷ or the parol evidence rule.¹⁸

III. LIMITATIONS ON CONFIDENTIAL RELATIONSHIPS

Before turning to an examination of the kinds of relationships recognized by the courts as giving rise to fiduciary obligations, three limitations on establishing a fact-based fiduciary relationship deserve mention. First, the alleged relationship must be found to have existed prior to the transaction at issue. Second, the reliance by the aggrieved party that the other would act toward him as a fiduciary must not have been merely subjective. Third, the alleged confidential relationship may not be established solely by private agreement, but must arise *sui generis* from the nature of the relationship. Each of these limitations engrafted by the courts is sensible and will be examined in turn.¹⁹

16. It is, for example, a basic principle of equity that a fiduciary has the burden of showing the fairness of his transactions with the beneficiary. *See Frowen v. Blank*, 425 A.2d 412, 418 (Pa. 1981) (confidential relationship between vendor and purchaser at time agreement was executed shifted to purchaser burden of proving transfer was fair); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex. 1951); *Consolidated Bearing & Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647 (Tex. App.—Amarillo 1986, no writ); *Tuttlebee*, 702 S.W.2d 253; *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Guerrieri v. Guerrieri*, 301 N.E.2d 603, 605 (Ill. App. Ct. 1973) (where confidential relationship exists, burden falls on grantee to show fairness of transaction).

17. An oral promise by a fiduciary may be enforceable notwithstanding the Statute of Frauds. *See Silver v. Silver*, 219 A.2d 659, 661 (Pa. 1966); *Jarnagin v. Busby, Inc.*, 867 P.2d 63, 67 (Colo. Ct. App. 1993); *Dodson v. Kung*, 717 S.W.2d 385, 388 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also* RESTATEMENT OF RESTITUTION § 182 (1937).

18. *See Linder v. Citizens State Bank of Malakoff*, 528 S.W.2d 90, 94 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (affirming the trial court's judgment notwithstanding the jury's verdict finding a confidential relationship for purposes of avoiding the parol evidence rule). *Linder* is a good example of a case that should not have gone to trial on the issue of a confidential relationship. The plaintiff alleged such a relationship between himself and a bank with which he had never had any business transactions, not even a bank account. Further, there was no allegation of fraud or unjust enrichment against the bank. *Compare Schiller v. Elick*, 240 S.W.2d 997, 1000 (Tex. 1951) (parol evidence rule will not bar evidence to prove existence of fiduciary relationship).

19. An anomaly that is in no sense a limitation on the parameters of confidential relationships deserves mention. Although there is nothing conceptually inelegant in framing a cause of action in terms of a breach of a confidential relationship, any more than as a breach of a fiduciary relationship, some jurisdictions specifically deny the existence of either as an independent cause. *See Todd Holding Co., Inc. v. Super Valu Stores, Inc.*, 874 P.2d 402, 404 (Colo. Ct. App. 1993) ("confidential relationship is merely an element in establishing a fiduciary relationship or some type of fiduciary duty;" "[A] confidential relationship may be an element of other causes of action but a breach of confidential relationship is not a cause of action in and of itself."); *First Nat'l Bank of Meeker v. Theos*, 794 P.2d 1055, 1061 (Colo. Ct. App. 1990) ("[E]xistence of a confidential relationship is simply one of the elements to be considered in determining whether there is fraud, undue influence, overreaching, or other improper conduct."). Regardless, even in jurisdictions that have not addressed the issue, the courts do not customarily speak of breach of a confidential relationship as an independent cause of action. The cause is usually couched in terms of the equitable remedy sought—such as an action to impose a constructive trust or equita-

A. RELATIONSHIP MUST EXIST PRIOR TO AND APART FROM THE TRANSACTION AT ISSUE

The courts uniformly hold that the alleged confidential relationship must be established on facts existing prior to and apart from the transaction in question.²⁰ Interestingly enough, the limitation is invariably stated as a self-evident truism and is unaccompanied by comment, explanation or discussion. Perhaps the limitation is obvious; it certainly is sensible. The gist of the aggrieved party's allegation is that the transaction at issue is tainted because he had a reasonable expectation that the other party would act toward him as a fiduciary. If the focus for the reasonableness of that expectation is entirely on the transaction at issue, then the allegation necessarily is based on status; i.e., the relationship of the parties arising from the transaction. What is there about the transaction that would cause the aggrieved party reasonably to believe that the other would assume fiduciary obligations toward him? If the answer is the transaction itself, then the aggrieved party is simply arguing that, because of the nature of the transaction, the other party should, as a matter of law, hold the status of a fiduciary. Formal fiduciary relationships arise as a matter of law based on the status of the parties. Conversely, informal confidential relationships, and the accompanying fiduciary obligation, are determined from the unique facts pertaining to the parties' particular relationship, and that relationship must *necessarily* precede the transaction at issue.

Further, the aggrieved party must always assert justifiable detrimental reliance on the other party's obligation to act as a fiduciary. But the asserted reliance always, indeed by necessity, takes the form of his having entered into the transaction at issue. The transaction *is* the reliance, and its reasonableness must therefore be based on facts existing prior thereto. Since the transaction itself is the event that constitutes the reliance neces-

ble lien, or for an accounting, or to set aside a deed—or in terms of a wrong more specific than the breach of the relationship—such as fraud (actual or constructive) undue influence, failure to disclose, or unjust enrichment. See, e.g., *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989) (describing confidential relationship as a frequently used basis for demonstrating undue influence sufficient to invalidate a will). The courts' reluctance to accept the violation of the relationship as the cause of action is both anomalous and confusing because the essence of the wrong, regardless of the remedy sought, is the breach of a confidential relationship. A current issue of debate is whether an attorney should be liable to his client independently for breach of a fiduciary duty when the usual causes of action for malpractice or breach of contract are not available. See Roy R. Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994) (arguing in favor of an independent cause of action for breach of fiduciary duty by attorneys).

20. See *Apple v. Apple*, 95 N.E.2d 334, 338 (Ill. 1950) (no confidential relationship where any influence or superiority was not obtained prior to the transaction at issue); *Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589, 597 (Colo. Ct. App. 1997) (allegation of confidential relationship failed where there was no pre-existing relationship of trust between the parties); *Capriulo v. Bankers Life Co.*, 344 S.E.2d 430, 433 (Ga. Ct. App. 1986) ("[A] confidential relationship does not exist prior to the contract or legal relationship creating it, unless it exists for other reasons." (quoting *Cole v. Cates*, 149 S.E.2d 165, 168 (Ga. Ct. App. 1966))).

sary to establish injury, it cannot logically also be the event that precipitates reliance.²¹ The party asserting the relationship cannot use the reliance itself as a bootstrap for its reasonableness.

What is unclear and questionable is the "apart from" element of the limitation. The courts invariably frame the limitation in terms of the relationship being both "prior to" and "apart from" the transaction at issue. Taken at face value, this might indicate that negotiations preliminary to the transaction could not be used to establish the confidential relationship. A literal reading of the restriction is, hopefully, unintended. To exclude absolutely preliminary negotiations from the mix of circumstances used to establish the confidential relationship would be unwise. For example, to take a clear case, if one party in negotiations, expressly or by rational implication, voluntarily assumes a fiduciary role, such as that of a trustee, surely this fact, even though not arising apart from the transaction, would be both relevant and conclusive as to the reasonableness of the aggrieved party's expectation.²² No court to date has directly addressed the issue of the ostensible dichotomy of "prior to" and "apart from." Perhaps each element is taken to be synonymous and the "apart from" portion is merely redundant. The party asserting the relationship, then, may use all facts existing prior to the transaction, including preliminary negotiations, to establish the relationship. Alternatively, perhaps negotiations are to be considered as sufficiently "apart from" the ensuing transaction to satisfy the requirement.

Although the facts establishing the confidential relationship must be based on those in existence prior to the transaction at issue, the length of the relationship is not of itself determinative.²³ A leading case on point is *Crim Truck & Tractor Co. v. Navistar International Transportation*

21. A prior fiduciary relationship between the parties, standing alone, may be insufficient to establish a confidential relationship between them even as to similar subsequent transactions. See *Evertson v. Cannon*, 411 N.W.2d 612, 626 (Neb. 1987) (prior dealings between parties coupled with the fact that one party subjectively trusts the other does not establish a confidential relationship). In *Evertson*, plaintiff and defendant were joint venturers under a farmout agreement for the drilling of an oil well on certain acreage. Defendant later acquired oil leases on the same acreage for purposes of drilling other wells. Plaintiff sued to establish a constructive trust on the new leases alleging a confidential relationship with defendant. In finding for defendant, the court held that no confidential relationship existed between the parties as to the acquisition of the leases at issue because the prior fiduciary relationship between the parties extended only to dealings within that relationship. See *id.* at 627.

22. For an example of such a situation, see *supra* text accompanying note 13.

23. See *Harris v. Sentry Title Co., Inc.*, 727 F.2d 1368, 1369 (5th Cir. 1984) (lengthy duration of prior relationship is but one factor to consider in determining confidential relationship); *Banca Cremi, S.A. v. Alex, Brown & Sons, Inc.*, 132 F.3d 1017, 1038 (4th Cir. 1997) (business relationship of long and cordial duration insufficient standing alone to establish confidential relationship); see also *Maguire v. Holcomb*, 523 N.E. 2d 688 (Ill. Ct. App. 1988), (a fiduciary relationship did not exist between buyers and sellers of a restaurant based upon long social acquaintance of one buyer with sellers and a student-advisor relationship between another buyer and one of the sellers some five years prior to the transaction at issue), *appeal denied*, 530 N.E.2d 248 (Ill. 1988); *Winston v. Lake Jackson Bank*, 574 S.W.2d 628, 628-29 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (claim of extensive prior dealings alleges no specific facts to demonstrate confidential relationship).

Corp.,²⁴ involving an action by a franchisee against its franchisor of a trucking franchise. The Supreme Court of Texas determined that no confidential relationship existed between the parties even though their business relationship under the contract had lasted for over forty years. The lengthy relationship had certainly developed into one in which the parties reposed in each other a mutual trust and confidence. But there was, however, no independent evidence in the trial record that the trust and confidence had risen to the level of fiduciary obligation. At best, the franchisee had merely alleged its own subjective reliance on its relationship with the franchisor.

B. MERE SUBJECTIVE RELIANCE WILL NOT ESTABLISH A CONFIDENTIAL RELATIONSHIP

Easily the most common reason given by courts for a refusal to find a confidential relationship is that "mere subjective trust" of the asserting party is insufficient to establish the relationship.²⁵ This limitation embodies three important connotations. First, and most obvious, the trust alleged by the party asserting the relationship must be both believable and verifiable from the objective facts. The question is one for the trier of fact. If the trier does not believe that the party alleging the confidential relationship placed trust in the alleged fiduciary, the allegation will fail. Further, a basis for that trust must be shown by objective evidence. The mere subjective assertion by the claimant is insufficient.

The second connotation of the "mere subjective trust" limitation goes to the level of trust reposed by the claimant. The claimant must show not just that he trusted the other party, but that he trusted him to act as a fiduciary. Further, reposing that level of trust must have been reasonable under the circumstances. It is the lack of this reasonableness that has caused so many courts to refuse to find in favor of a confidential relationship. That was ultimately the basis for the court's decision in the previously mentioned *Crim Truck* case.²⁶ Despite an ongoing franchise relationship of over forty years, in which undoubtedly both parties reposed trust and confidence in each other, no reasonable basis was demonstrated by the franchisee for its alleged expectation that the franchisor would act toward it as a fiduciary.

An early, widely-cited decision emphasizing the higher level of trust necessary to establish a confidential relationship is that of the Supreme

24. 823 S.W.2d 591 (Tex. 1992). *But see* Consolidated Gas & Equip. Co. of America v. Thompson, 405 S.W.2d 333, 337 (Tex. 1966) (a confidential relationship could arise "when, over a long period of time, the parties . . . worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced.").

25. *Banca Cremi*, 132 F.3d at 1038; *Crim Truck*, 823 S.W.2d at 595; Rankin v. Naftalis, 557 S.W.2d 940, 944 (Tex. 1977); *Consolidated Gas*, 405 S.W.2d at 336; Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); Landes v. Sullivan, 651 N.Y.S.2d 731 (N.Y. App. Div. 1997); Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 416 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Consolidated Bearing*, 720 S.W.2d at 649; Atrium Boutique v. Dallas Mkt. Ctr. Co., 696 S.W.2d 197, 200 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

26. *Crim Truck*, 823 S.W.2d at 591; *see supra* note 24 and accompanying discussion.

Court of Texas in *Thigpen v. Locke*.²⁷ Locke brought suit to set aside two deeds that conveyed a lot and grocery store to the defendant, Thigpen. Thigpen was a trust officer of the local bank. Locke owned a grocery store in which Thigpen bought meat frequently. During the course of their relationship, Thigpen loaned money to Locke and took the deeds to the lot and store as a mortgage. The facts revealed that Thigpen was an officer, director and shareholder of Locke's business and that he often acted as an advisor to Locke in the management of the grocery store. The facts further demonstrated that Thigpen and Locke had become close friends, that Thigpen helped Locke obtain loans, and that he personally guaranteed one of those loans. Despite all of the foregoing, the court concluded that no confidential relationship existed between the parties. Locke had demonstrated no more than a "merely subjective trust" in Thigpen that did not rise to the level necessary to impose fiduciary obligation. The court said:

Taking the testimony as a whole and most favorably to the respondents, we hold that in this case there is not such evidence of justifiable trust and confidence as will create a fiduciary relationship. We may assume that respondents did trust Mr. Thigpen; they have testified so time and time again, but mere subjective trust alone is not enough to transform arm's length dealing into a fiduciary relationship so as to avoid the statute of frauds. Businessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here. If we should permit respondents to set aside their conveyances on such slender evidence, the security of contracts and conveyances in this state would be seriously jeopardized.²⁸

There is yet a third connotation implicit in the "mere subjective trust" limitation. It is essential that the person to be charged with a fiduciary obligation arising from a confidential relationship be aware that the other party has that expectation. There is little focus in the case law on this point, no doubt because the requirement that the claimant demonstrate by objective evidence that his expectation of the alleged fiduciary was

27. 363 S.W.2d 247 (Tex. 1962).

28. *Id.* at 253; *see also* *Evertson v. Cannon*, 411 N.W.2d 612, 626 (Neb. 1987) (fact that one businessman trusts another is not enough to establish confidential relationship); *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) ("Subjective trust, cordiality and the trust which prevails between businessmen, which is the foundation of ordinary contract law, affords no basis for the imposition of an oral trust that thwarts the Statute of Frauds."); *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank Nat'l Ass'n*, 786 S.W.2d 386, 391 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (mere subjective trust in bank creditor by debtor insufficient to establish confidential relationship so as to prevent bank from buying loan collateral at "unconscionably" low price at foreclosure sale); *Consolidated Bearing*, 720 S.W.2d at 649 (emphasizing "the distinction between factual proof of a confidential relationship and mere subjective assertions by one party"); *Thomson v. Norton*, 604 S.W.2d 473, 476 (Tex. Civ. App.—Dallas 1980, no writ) (opining that parties to a contract usually have some degree of mutual trust and confidence, otherwise they would not contract with each other); *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int'l, Ltd.*, 251 A.D.2d 137 (N.Y. App. Div. 1998) (mere subjective claims of reliance on defendant's expertise do not give rise to confidential relationship).

reasonable carries with it the implicit assumption that the party to be charged has reason to know of the expectation. However, in cases in which the expectation of the fiduciary is that she engage in or refrain from conduct of a specific nature, the courts do expressly require that she have actual or constructive knowledge of that particularized expectation. The requirement that the alleged fiduciary have actual or constructive awareness of the claimant's expectation has been aptly labeled the "two-way street" rule. In *Furr's, Inc. v. United Specialty Advertising Co.*,²⁹ plaintiffs alleged that Furr's had violated a confidential relationship with plaintiffs by wrongfully divulging a trade secret. The trial court judgment in favor of the plaintiffs was reversed on appeal. The reversal was based primarily on the necessity of a confidential relationship being a "two-way street."³⁰ Although the trial record clearly supported plaintiffs' assertions that they had utmost confidence in Furr's and relied on their integrity, there was no showing that Furr's was made aware at any time that the trade secret was disclosed to Furr's in confidence. Other cases have made reference to the "two-way street" rule merely to emphasize the unfairness in finding a confidential relationship where, notwithstanding a history of a prior business relationship based on trust and confidence, the parties had always conducted their affairs at arm's length.³¹ In these cases the application of the rule only emphasizes the lack of objective verification of the reasonableness of the claimant's subjective expectation.

C. A CONFIDENTIAL RELATIONSHIP MAY NOT BE ESTABLISHED (OR BARRED) BY PRIVATE AGREEMENT

As a general rule, equity jurisdiction may be neither invoked nor barred by private agreement.³² The primary function of equity is to tailor a remedy to achieve justice where the customary application of rules of law prove inadequate to the task. Our courts have historically retained extraordinary discretion in determining whether or not equity will intervene. Accordingly, it is understandable that notions of freedom of contract will not be allowed to usurp that discretion. To date, apparently only one court has addressed the issue of whether a contract provision claiming that it was a "personal agreement involving mutual confidence

29. 385 S.W.2d 456 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.).

30. *Id.* at 459.

31. See, e.g., *Hoover v. Cooke*, 566 S.W.2d 19, 26 (Tex. Civ. App.—Corpus Christi 1978, writ reh'g n.r.e.) ("A 'confidential relationship' is a 'two-way' street; one party must not only trust the other, but the relationship must be mutual and understood by both parties . . ."); see also *Jarnagin v. Busby, Inc.*, 867 P.2d 63, 67 (Colo. Ct. App. 1993) (to establish confidential relationship there must be proof that "either the reposing of trust and confidence in the other party was justified, or the party in whom such confidence was reposed either invited, ostensibly accepted, or acquiesced in such trust. . .").

32. See generally R. ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 13.11 (1988).

and trust" established a confidential relationship between the parties.³³ The court ruled that it did not. However, although never determinative, such an agreement would certainly be relevant in context with other supporting evidence to establish a confidential relationship. At the very least, it could help demonstrate that one party's assertion of the relationship was not merely subjective.

A contract provision denying the existence of a confidential relationship, on the other hand, when in fact such a relationship did exist, should always be invalid and unenforceable. It would, in effect, represent a disclaimer of fiduciary liability which, under the familiar rule everywhere, is void as against public policy.

IV. CONFIDENTIAL RELATIONSHIPS: A CATEGORICAL ANALYSIS

Unlike formal fiduciary relationships, confidential relationships are not based on status. They are, instead, fact-based. Yet, the complexities and vagaries of human relationships are so infinitely varied and confusingly overlapping that the mind boggles when trying to make useful distinctions among them. The temptation to generalize is thus irresistible. Understandably, then, the courts often speak in terms of categories in determining the existence of confidential relationships. Across a continuum from, at one end, family relationships, through others, such as close personal (or "family-like") relationships and friendships, to, at the other end, business and arm's length relationships, the courts fashion the pigeonholes for sorting the facts of a particular case.

Any discussion of the issue of confidential relationship must begin with a general description of its nature. Was it familial or merely arm's length or something in between? From the answer, certain broad, but not unhelpful, generalizations can be made. If the core essence of confidential relationship is justifiable reliance by the beneficiary on the bona fides of the fiduciary, and it is, then in familial or family-like situations little evidence sustaining reliance will be necessary to establish the required relationship. Conversely, if we move to the other end of the spectrum, to business and arm's length situations, persuasive and compelling evidence will be required for a finding of a confidential relationship.

But an important caveat is necessary. The generalizations are nothing more. The categories do not convey status. They cover the spectrum of human interaction. Not all marriages are made in heaven—or hell. Not all mothers love their daughters, nor sons trust their fathers. "Friendship," even "close personal friendship," defies concrete connotation.

33. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591 n.7 (Tex. 1992). The provision read in pertinent part as follows: "This is a personal agreement, involving mutual confidence and trust, and it may not be assigned by either party without the written consent of the other party. . . ." *Id.* at 595. The court construed the intent of the provision merely to prohibit assignment and not to reflect an actual confidential relationship.

One can enjoy another's companionship, even intensely so, without conveying to the other trust and confidence. Business associations, even arm's length ones, can develop over time to transcend the absence of kinship and friendship and to nurture a high level of trust and confidence. It's just that the further the move down the continuum from familial to arm's length relationships, the greater the need for persuasive evidence to sustain the plausibility of the assertion that the one party was justified in placing his reliance in the other to treat the one's interest at least on par with the other's own. An analysis of the cases by category supports this conclusion.

A. FAMILIAL RELATIONSHIPS

Of Oral Trusts and Dependent Plight

The term "familial" in the present discussion is used advisedly to refer to associations with members of one's own core family unit, as well as with persons related by blood or marriage. It is with members of this group of people that one will most understandably repose the level of trust and confidence that will give rise to a confidential relationship in the eyes of equity. In turn, it is this category that represents the saddest of cases. It is one thing to deal sharply or dishonestly with a mere acquaintance. It is quite another to violate the trust of a member of one's own family. It is an unhappy commentary that such cases are common in the reported decisions.

From the familial relationship cases two generalizations unfold. First, a familial relationship does not automatically give rise to the status of a confidential, fiduciary relationship.³⁴ Second, in familial situations a confidential relationship is comparatively easy to prove. If the alleged fiduciary is guilty of wrongful conduct leading to illicit gain, the courts often find in favor of the required relationship without discussion. Although I am familiar with no case so putting the matter, there is a virtual rebuttable presumption in favor of confidential relationships in many familial situations.³⁵ Several jurisdictions, however, profess to subject dealings

34. See *Halle v. Summerfield*, 287 S.W.2d 57, 62 (Tenn. 1956) (relations between family members and relatives are not, in and of themselves, confidential relationships); *Tuttlebee v. Tuttlebee*, 702 S.W.2d 253, 256 (Tex. App.—Corpus Christi 1985, no writ) ("Neither a family relationship nor the mere fact of bestowing benefits establishes a fiduciary relationship."); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980) (standing alone, the relation of aunt and nephew does not establish a confidential relationship); *Guerrieri v. Guerrieri*, 301 N.E.2d 603 (Ill. App. Ct. 1973) (mere relationship of parent and child does not create confidential relationship as matter of law); *Anaya v. Estrada*, 447 S.W.2d 245 (Tex. Civ. App.—El Paso 1969) (no confidential relationship between brothers and sisters); *Apple v. Apple*, 95 N.E.2d 334 (Ill. 1950) (mere fact of family relation does not create fiduciary relationship as matter of law); *Allen v. Jones*, 110 P.2d 911 (Okla. 1941) (no confidential relationship between parent and adult child).

35. The past quarter century has seen a dramatic expansion in the rights of married women. Today the law everywhere is that their rights are equal to those of their husbands. Previously, when the law made women subservient to their husbands, even with respect to dealing with their own property, the presumption was that the husband owed to his wife a fiduciary duty in business transactions with her and with third parties when the transac-

between spouses to no different treatment.³⁶ Nevertheless, unlike with formal fiduciary relationships, the obligations attendant to familial fiduciary relationships may be rebutted. It is quite natural to presume that an abiding trust and confidence will be placed in members of one's family, and it is thus fair to require a showing of the unreasonableness of the presumption in a particular case. What is it that taints this particular relationship that would make the customary interaction of family members inappropriate?³⁷ The cornerstone of a confidential relationship is objectively verifiable and justifiable reliance. That kind of reliance is commonly part of close family relationships. Good reason needs to be shown when it is not.

Indeed where the relational bond is obviously inherently strong, such as parent to child or one spouse to another, the tendency of the courts is

tions involved the wife's property. The changes in the law regarding women's rights have caused many jurisdictions to invalidate the presumption and to hold that the marriage relationship is not per se a fiduciary one. See *Tedesco v. Tedesco*, 683 A.2d 1133 (Md. Ct. Spec. App. 1996) (state statute giving equality of rights to men and women invalidated former presumption that husband was fiduciary of wife; "Unlike many jurisdictions, Maryland does not presume the existence of a confidential relationship in transactions between husband and wife." *Id.* at 1144). See also *Bell v. Bell*, 501 A.2d 817 (Md. 1985) (common law presumption that husband was dominant figure in marriage no longer valid).

Nevertheless, the common law presumption has been replaced in many jurisdictions with a standard of close scrutiny of transactions between spouses so that the results in the cases represent little, if any, change, other than perhaps to impose upon the wife a standard of dealing formerly only imposed on the husband. In *Tedesco*, the court subscribed to the following description of the current attitude:

Generally, however, on account of the natural dominance of the husband over the wife, and the confidence and trust usually incident to their marriage, a court of equity will investigate a gift from a wife to her husband with utmost care, especially where it strips her of all her property; and the burden of proof is on the husband to show that there was no abuse of confidence, but that the gift was fair in all respects, was fully understood, and was not induced by fraud or undue influence.

Tedesco, 683 A.2d at 1144 (quoting *Manos v. Papachrist*, 86 A.2d 474, 476 (Md. 1951)).

Many jurisdictions, however, continue to hold that marriage creates a rebuttable presumption of a confidential relationship. See *In re Estate of Lutz*, 563 N.W.2d 90 (N.D. 1997) (noting that the presumption is that confidential relationship exists between husband and wife and reversing summary judgment against wife in action against deceased husband's estate to invalidate pre-nuptial agreement); see also *In re McKittrick Trust*, 865 P.2d 1099 (Mont. 1993) (presumption in favor of confidential relationship between husband and wife was rebutted by the evidence); cf. *infra* note 38.

36. See *In re Estate of Tollefsrud*, 275 N.W.2d 412, 418 (Iowa 1979) (court inferred "a legislative intent that commercial dealings between spouses shall be given no different treatment than those between other parties"); *Punelli v. Punelli*, 364 N.W.2d 259 (Iowa Ct. App. 1984) (wife, who asserted confidential relationship between herself and deceased husband so as to shift from her burden to prove fairness of transactions between them, did not meet her burden of showing by clear and convincing evidence existence of confidential relationship where there was no showing that she placed special confidence in husband and facts indicated that wife had business experience, took active role in management of business affairs, and was not dominated by her husband).

37. A showing of a strained relationship or of a lack of trust between family members should readily rebut the inference of a confidential relationship. In a formal fiduciary relationship, however, a strained relationship is irrelevant. See *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938) ("If the existence of strained relations should be suffered to work an exception [to the duties of a formal fiduciary], then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain.").

to find a confidential relationship as a matter of law.³⁸ For example, in *Thames v. Johnson*,³⁹ two daughters brought suit against their father and stepmother to recover damages from the wrongful sale of real property in which they held an interest with their father. The property had been obtained by the daughters upon the death of their mother as part of the mother's interest in the community estate. At the time of their mother's death, the daughters were minors of ten and seven years of age. The property, however, was not wrongfully sold until some eighteen years later, by which time the daughters had reached majority. Nevertheless, the court upheld their claim of constructive fraud for breach of a confidential relationship, stating that "the simple fact of the parent-child relationship coupled with the girls' youth at the time of their mother's death confers a duty to uphold a fiduciary relationship."⁴⁰ Similarly, in *Mathews v. Mathews*,⁴¹ the plaintiff and defendant had lived together as husband and wife for almost twenty-five years. They then discovered that the husband's former marriage was still valid and they were therefore not legally married. At the time of this unfortunate discovery, the husband was in the hospital seriously ill. He worried that his legal wife might try to take his interest in the property from the defendant in event of his death. He thus deeded their home to the defendant, who promised to reconvey it to them jointly in the event he got out of the hospital. On these simple facts the court affirmed the trial court's judgment granting a constructive trust based on a confidential relationship "as a matter of law."

A study of the familial relationship cases demonstrates that the significant majority of them fall within two general fact patterns. Both patterns reflect a common plight giving rise to dependency in one party and op-

38. A unique line of cases ostensibly presumes a confidential relationship based upon marriage. In these cases, the relationship between the former spouses is used against an innocent third party who has no prior relationship with and has done no wrong to the claimant. The action is typically by the first wife of the deceased against the second to recover proceeds of a life insurance policy. As part of a property settlement pending divorce, the deceased husband had promised to maintain the life insurance policy in a certain amount in favor of the first wife and their children. After the husband remarries and without the knowledge of the former wife, the husband cancels the insurance policy in breach of the property settlement agreement. The breach is first discovered upon his death, at which time an insurance policy exists on his life with his current spouse as the beneficiary. Although there are no proceeds of the canceled policy to trace into the current one, and even though the widow has no knowledge of her husband's separation agreement with the claimant, the courts typically grant the former spouse a constructive trust in the proceeds of the current insurance policy. Little rationale is given to support the result other than vague reference to the "equitable rights" of the former spouse and children or the unpersuasive suggestion that the surviving spouse would somehow otherwise be unjustly enriched. See *Hudspeth v. Stoker*, 644 S.W.2d 92 (Tex. App.—San Antonio 1982, writ ref'd) (focusing on the equitable rights of the former spouse and children); *Simonds v. Simonds*, 380 N.E.2d 189 (N.Y. 1978) (suggesting an unjust enrichment of the surviving spouse).

39. 614 S.W.2d 612 (Tex. Civ. App.—Texarkana 1981, no writ).

40. *Id.* at 614.

41. 310 S.W.2d 629 (Tex. Civ. App.—Houston 1958, no writ); see also *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980) (finding a confidential relationship between an aunt and nephew as a matter of law). The case is discussed *infra* note 62.

portunity leading to avarice in the other.⁴² In one pattern, the alleged fiduciary has taken property from the claimant with the promise to reconvey it and wrongfully refuses to make the reconveyance. In the second pattern, the alleged fiduciary has taken advantage of the claimant's plight to euchre money and property from the claimant. In both patterns, once the confidential relationship is established, equitable remedies are allowed. In the first, a constructive trust is usually placed on the property wrongfully withheld. In the second, under the familiar rule, the fiduciary is required to demonstrate the fairness of the transactions with the disadvantaged claimant. Upon his failure to do so, judgment is given in favor of the claimant, which may include a simple monetary recovery, with or without punitive damages, or various equitable remedies such as an accounting or a constructive trust.

An early case representative of the first pattern is the decision of the Supreme Court of Texas in *Mills v. Gray*.⁴³ This was a suit by a mother against her son for breach of an oral trust. The mother alleged that certain real property was conveyed to her son as part of a plan to settle amicably the community estate of her and her husband. She alleged that her son agreed to hold the property in trust and to reconvey it to her after the divorce was finalized. No consideration was given by the son in exchange for the property. He denied the existence of the trust and alleged that he received the property in exchange for his promise to support his mother as long as she wished. The trial court excluded evidence of the oral trust from the jury, which in turn found in favor of the son's version of the oral agreement. The Supreme Court of Texas affirmed the decision of the intermediate appellate court reversing the trial court's judgment and remanding for a new trial. The court reasoned that, even though

42. A budding contention that fits the parameters of this paradigm is currently being made in family law courts in community property states, such as Texas. The suggestion is that, based on a special relationship of trust and confidence, the spouse who manages the community property of the marriage owes broad fiduciary duties to the non-managerial spouse, including the duty to treat the community at all times favorably to her separate estate. This priority would, apparently, encompass giving all investment opportunity first to the community and to pay debt obligations first out of the managing spouse's separate estate. See Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 279 (1997) ("The spouse who is managing sole management community property can be compared to a trustee."); Bradley R. Adams, Comment, *The Doctrine of Fraud on the Community*, 49 BAYLOR L. REV. 445, 449 (1997) ("The managing spouse is the fiduciary of the other spouse in the management, control and disposition of special community property."); see also *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) ("A trust relationship exists between husband and wife as to that community property controlled by each spouse."). However, the only case to date that has directly addressed the issue of enhancing the separate estate at the expense of the community estate refused to find a fiduciary obligation in the absence of fraud. See *Holloway v. Holloway*, 671 S.W.2d 51, 59 (Tex. App.—Dallas 1983, writ dism'd) ("In engaging in a new and speculative venture . . . a married entrepreneur . . . cannot be held guilty of a breach of fiduciary duty in the absence of evidence of an intent to defraud."); see also *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (rejecting an independent tort claim for fraud on the community estate by the managing spouse; adequate remedy for fraud on the community is provided by the statutory rules pertaining to property division upon divorce).

43. 210 S.W.2d 985 (Tex. 1948).

there was no allegation by the mother of fraud, accident, or mistake, if her version of the oral agreement were found to be true a constructive trust should have been granted in her favor based on a confidential relationship with her son.⁴⁴

Where one party expressly agrees to hold property in trust, a confidential relationship and the accompanying fiduciary obligations arise as a

44. The court relied heavily on 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 44.2, at 451 (4th ed. 1987) which suggests that "numerous cases" support allowing a constructive trust even though the transferee intended to perform his promise at the time he acquired the property and was thus not guilty of fraud in acquiring it, and even though he did not take improper advantage of the confidential relationship in procuring the transfer and was not guilty of undue influence. "The abuse of the confidential relation in these cases consists merely in his failure to perform his promise." *Id.* at 458. The court also quoted favorably from the following analysis in 54 AM. JUR. § 233 (1945):

A constructive trust arises where a conveyance is induced on the agreement of a fiduciary or confidant to hold in trust for a reconveyance or other purpose, where the fiduciary or confidential relationship is one upon which the grantor justifiably can and does rely and where the agreement is breached, since the breach of the agreement is an abuse of the confidence, and it is not necessary to establish such a trust to show fraud or intent not to perform the agreement when it was made. The tendency of the courts is to construe the term 'confidence' or 'confidential relationship' liberally in favor of the confider and against the confidant, for the purpose of raising a constructive trust on a violation or betrayal thereof. A parent and child, grandparent and child, or brother and sister relationship is not intrinsically one of confidence, but under circumstances involves a confidence the abuse of which gives rise to a constructive trust in accordance with the terms of an agreement or promise of a grantee to hold in trust or to reconvey.

Id.

In an earlier case, *Kidd v. Young*, 190 S.W.2d 65 (Tex. 1945), the Supreme Court of Texas refused to impose a constructive trust on facts almost identical to those in *Mills*. The oral promise to reconvey had been made by a son and daughter to their parents. The court denied admission of parol evidence to establish the agreement to hold the property in trust because the deed expressed an absolute transfer for consideration. However, there was no discussion by the court of a confidential relationship between the parties because, presumably, it had not been alleged. The action was simply one at law, not in equity, and the court's application of the parol evidence rule was thus correct.

Occasionally a court misreads the decision in *Kidd* by applying its rationale to a breach of an oral trust by an alleged fiduciary. For example, in *Sevine v. Heissner*, 220 S.W.2d 704 (Tex. Civ. App.—Austin 1949, no writ rev'd, 224 S.W.2d 184 (Tex. 1949)), a sister orally agreed to hold real property for her sister as an equal owner. The property had been conveyed to her as part of an estate settlement on the advice of her attorney who said it would facilitate the management and disposition of the property. The court refused to allow evidence of the oral trust. After discussing both the *Kidd* and *Mills* cases, the court decided to follow *Kidd* even though it recognized that no confidential relationship issue had been raised in that case. The court reasoned that the situation before it was more analogous to *Kidd* because, as in *Kidd*, there was contractual consideration expressed in the deed to the defendant sister, whereas in *Mills* the deed merely expressed a recital of consideration. This distinction is, of course, erroneous. The parol evidence rule should never bar evidence of fraud, because it goes to the enforceability rather than the content of the writing. An allegation of a breach of an oral agreement by a fiduciary is an allegation of constructive fraud and, as such, should always be admissible to contravene the enforceability of a writing.

Better-reasoned decisions cite the rule in the *Kidd* case only after determining that an alleged confidential relationship did not exist between the parties. Without a confidential relationship, the constructive fraud claim thus fails and the parol evidence rule becomes properly applicable. See *Anaya v. Estrada*, 447 S.W.2d 245, 247 (Tex. Civ. App.—El Paso 1969, no writ).

matter of law. The promisor has voluntarily assumed the status of a fiduciary in the same way that a formal fiduciary, such as a lawyer or doctor, assumes that status by voluntarily entering into the formal relationship. Further, the voluntary assumption of an informal fiduciary obligation can arise by *implication* where, for example, a business entity sues to recover monies due not to it but to one of its members or where a governmental entity, such as a state or municipality, sues to recover for a loss suffered by its employees.⁴⁵ In such cases, the business or governmental entity does not have actual standing to maintain a suit at law because it has not suffered a loss. Nevertheless, the courts in equity have allowed standing on the theory that the entity is the most convenient party to maintain the action and upon the implication that it acts as a trustee for the real parties in interest and holds any recovery for their benefit.

Similarly, in familial situations it is not necessary that the party to whom the property is conveyed expressly promises to hold the property "in trust." The trust is the rational implication of the oral promise to hold the property and reconvey it at a future date. For example, in *Gause v. Gause*,⁴⁶ the court found a "verbal trust" even though there was no allegation of an express trust. The suit was by a son and his wife against his mother to impose a constructive trust upon land held by her. The son had

45. See, e.g., *Grand Trunk W. R.R. Co. v. Chicago & W. Ind. R. Co.*, 131 F.2d 215 (7th Cir. 1942). In *Grand Trunk*, the court found a confidential relationship between a parent railroad and one of its subsidiaries based upon an earlier cause of action brought by the parent against another subsidiary to recover for underpayment of its share of a state stock tax assessed against the parent. The subsidiaries had all contributed equally to the payment of the tax under an erroneous reading of the corporate charter. When it was later determined that the charter should be read to require unequal payments based upon usage of the railroad facilities, the result was that some of the subsidiaries had overpaid while others had underpaid. The parent then brought suit against the underpaying subsidiaries and recovered judgment. In *Grand Trunk*, the action was by an overpaying subsidiary against the parent to recover the amount of the overpayment. The cause of action was in equity based on a confidential relationship theory because an action at law was barred by the statute of limitations. The court allowed recovery, reasoning that the parent, by implication, was acting as a trustee for the overpaying subsidiaries when it brought the earlier action against the underpayers. The court noted that the parent, having been paid in full for the stock tax, could not have been bringing the action for any loss it had suffered. See *id.* at 217, 219; see also *Jersey City v. Hague*, 115 A.2d 8 (N.J. 1955) (allowing a municipality to maintain action against former mayors to recover salary kick-backs paid to the mayors by city employees over a period in excess of thirty years as a "price" for continuing their employment). Although the city itself had suffered no actual loss, the court emphasized that one of the pleas of the city was for a recovery "as trustee for the use and benefit of the employees." *Id.* at 16.

Further, a promise to hold property in trust or to reconvey it can also be found by implication. See *Sharp v. Kosmalski*, 351 N.E.2d 721, 723 (N.Y. 1976) discussed *infra* note 101; see also *Sinclair v. Purdy*, 139 N.E. 255, 258 (N.Y. 1923), in which Justice Cardozo stated:

Here was a man transferring to his sister the only property he had in the world He was doing this, as she admits, in reliance upon her honor. Even if we were to accept her statement that there was no distinct promise to hold it for his benefit, the exaction of such a promise, in view of the relation, might well have seemed to be superfluous.

See also *Farano v. Stephanelli*, 183 N.Y.S.2d 707, 713 (N.Y. App. Div. 1959) (remedy of constructive trust need not be determined by express promise of fiduciary to reconvey property upon demand).

46. 430 S.W.2d 409 (Tex. Civ. App.—Austin 1968, no writ).

conveyed the land to his father on the oral representation of both parents that their survivor at death of the other would reconvey the land to the son and his wife. The parents paid valuable consideration for the land and conducted improvements thereon over the years. The trial court granted a constructive trust in the property to the son and his wife subject to an equitable lien in favor of the mother in the amount of the consideration paid and the cost of the improvements. In affirming the trial court's judgment, the court on appeal concluded that the "verbal trust" had been proved by "reasonably clear and certain" evidence.⁴⁷ The court also concluded that a confidential relationship had existed between the son and his parents at the time of the transaction in question. However, the only evidence referred to by the court in finding a confidential relationship, other than the status of parents and child, were that the son was an adult of twenty-four years at the time of the transaction and of facts surrounding the transaction that are merely typical of arm's length bargaining. The implication of a verbal trust arising from the promise to reconvey is thus the stronger basis for the decision. The familial relationship between the parties merely lent credence to the assertion of the oral promise.

Such credence is important, because the courts do require convincing proof of the oral promise before they are willing to contravene the integrity of deeds and written contracts. It may be believable that one would convey valuable property to a close family member upon the naked, oral assurance of reconveyance, whereas a similar transaction with someone else would be inherently unbelievable. But a family relationship is not determinative. For example, in *Anaya v. Estrada*,⁴⁸ the court refused to cancel a deed and to impose a constructive trust on land that had been deeded to a brother by his siblings. The land had passed to all of them upon death of their father in 1928, at which time all of the children lived on the land. Following the father's death, the brother had ordered the other children off of the land. Over the years the brother paid the mortgage debt and taxes on the land and conducted valuable improvements. He did so for over fifteen years, at which time his brothers and sisters deeded the land to him. Over twenty more years passed before they demanded that the land be divided between them. Upon the brother's refusal, suit was filed. The plaintiffs alleged that their brother had orally promised to hold the land in trust for them until he could sell it and divide the proceeds among all the brothers and sisters. Although the court did not emphasize the point, there was apparently no evidence in the record to support the alleged oral agreement other than the assertion of the various plaintiffs, an assertion belied by the brother's having remained without objection in exclusive possession of the land for some thirty-five years, twenty of those coming after the claimants had deeded the property to him. In affirming the trial court's judgment against the plaintiffs, the court emphasized instead that there was no evidence in the record to

47. *Id.* at 415.

48. 447 S.W.2d 245 (Tex. Civ. App.—El Paso 1969, no writ).

support a confidential relationship between the brother and the plaintiffs, "the only evidence set forth being that they were brothers and sisters and had been to some extent on a friendly basis."⁴⁹ Thus, held the court, parol evidence of the oral trust could not be introduced to contradict the terms of the deed of conveyance.

Similarly, in *Allen v. Jones*,⁵⁰ the Supreme Court of Oklahoma refused to impose a constructive trust on real property held by the defendants, who were the claimant's grandparents and the parents of the claimant's father. The defendant's son, the claimant's father, had conveyed the property to third persons and, in turn, his parents had repurchased it. Apparently, the theory of the daughter's cause of action was that her father's parents had impliedly repurchased the property in trust for him. However, there was no evidence in the record to indicate that this was indeed the intent of the parents, nor any evidence to support the trial court's finding of a confidential relationship between the parents and the son. Although the son was a heavy drinker, the evidence showed that he was competent to conduct business when sober and was of average intelligence. The son had sold the real property against the wishes of his parents and for less than its value. Upon discovering this, the parents repurchased the property in their own name. Because the sales were made by the son without the knowledge of the parents and apparently against their wishes, it was reasonably clear that the son did not repose the kind of confidence or dependence upon his parents necessary to support a confidential relationship. The court concluded that the security of real estate transactions demanded that proof of a confidential relationship be established by "clear, strong and unequivocal [evidence] . . . of the most satisfactory and trustworthy kind."⁵¹ This the claimant had failed to do.

The strong inclination to protect the validity of a written conveyance against assault by a self-serving allegation of a contrary oral agreement has perhaps led an occasional court to refuse to recognize the existence of a confidential relationship when the facts as alleged, if proved, would clearly support its existence. The unfortunate result is that the court thereby gives a false signal as to the threshold of clarity necessary to prove a confidential relationship rather than a true signal of the clarity necessary to prove the alleged oral agreement.

A case in point is the decision of the Supreme Court of Georgia in *Dixon v. Dixon*.⁵² The factual allegations clearly met even the most stringent concept of a confidential relationship. The allegations were that the defendant was the brother of plaintiff's husband, a successful businessman and one whose business ability the plaintiff and her husband greatly respected. Their relations with the defendant were very cordial and close,

49. *Id.* at 247.

50. 110 P.2d 911 (Okla. 1941).

51. *Id.* at 917.

52. 87 S.E.2d 369 (Ga. 1955).

and he had always given them advice as to business matters when requested to do so. Plaintiff and her husband had suffered lengthy illnesses and had become unable to pay off a mortgage loan on their tobacco farm. Foreclosure was probable. Although they had a cash offer for the property at near its market value, they wished to keep the farm and sought defendant's advice. He agreed to take charge of the operation of the farm and to try to work it out of debt. He said the tobacco on the farm would be sold under a government plan, which he allegedly misrepresented would require him to be the owner of the farm in order to make sales under the plan. The land was deeded to defendant in reliance on his promise to reconvey it when the loan was paid off. In the ensuing action to impose a trust on the property, the trial court entered judgement in accordance with the jury verdict in the plaintiff's favor. On appeal, the Supreme Court of Georgia reversed. Without discussion, the court ruled that plaintiff's factual allegations did not constitute a confidential relationship. The court also rejected her fraud claim on the basis that she had presented no evidence that defendant knew that his statement regarding the government tobacco plan was false or of any intention by defendant to deceive. The court further noted that there was no evidence that the alleged oral agreement had been breached because there was no showing that the farm had earned sufficient monies to pay off the debt. Finally, after a lengthy analysis, the court found that the trial court had committed reversible error by instructing the jury that the believability of the alleged oral agreement must have been proved by a preponderance of the evidence. The court noted that to contravene a deed absolute on its face an alleged parol agreement must be supported by proof "so clear, strong, and satisfactory, as to leave no reasonable doubt as to the agreement."⁵³ The court then remanded the case for a new trial. It seems clear that the true basis of the court's decision was the absence of a finding of clear and convincing evidence supporting the oral agreement, rather than the court's unsupported and questionable conclusion that no confidential relationship existed between the parties.

Meeting the strict proof requirement for the oral agreement is aided immeasurably when the close familial relationship is coupled with evidence that the property was acquired for substantially less than its real value. The underpayment by the defendant for the value received is often indicative of his having taken unfair advantage of the plight of the claimant. For example, in *Hamblet v. Coveney*,⁵⁴ the trial court granted a constructive trust against real estate held by a niece upon a jury finding of a confidential relationship between the aunt and the niece. The aunt had become delinquent in her mortgage payments and had sought to sell her house. The niece and her husband agreed to purchase the house for \$80,000 cash and a promissory note for an additional sum of approximately \$65,000, a portion of which represented a loan from the aunt to

53. *Id.* at 375.

54. 714 S.W.2d 126, 128 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

the niece and her husband. The defendants then persuaded the aunt to sign sale closing documents reflecting a total sales price of only \$80,000, with no debt obligation, by assuring the aunt that "they had their own side agreement."⁵⁵ On appeal, the court affirmed the judgment of the trial court, finding that the aunt had met the burden of "strict proof" of the oral agreement and of the confidential relationship necessary to establish a constructive trust. Although the evidence was disputed, the aunt had shown that the families had a close relationship over many years, that the aunt had assisted the niece during this period, that the families often spent holidays together, that the niece's husband was accepted as part of the family, and that the aunt had grown to trust and rely upon him. Although the jury had found that the fraudulent conduct was entirely that of the niece's husband, and none of her own, a constructive trust was nevertheless appropriate on her interest in the property based on her "unjust enrichment" arising from the confidential relationship she had with her aunt.

Persuasive evidence of an oral agreement to hold property for another and to reconvey it or its proceeds upon demand may take many forms, including the testimony of disinterested third parties⁵⁶ or proof that the

55. *Id.* at 132; see also *Johnston v. Mabrey*, 677 S.W.2d 236 (Tex. App.—Corpus Christi 1984, no writ) (constructive trust imposed on property deeded by former husband to former wife before their second marriage which ended in divorce).

56. See, e.g., *Hatton v. Turner*, 622 S.W.2d 450 (Tex. Civ. App.—Tyler 1981, no writ). In *Hatton*, the defendant had told several persons, including his brothers and sisters, that he was holding real estate conveyed to him by deed from his father for the benefit of the entire family. The property had been deeded to him with no return consideration so that his father could qualify for old-age insurance. See *id.* at 453. In imposing a constructive trust in favor of the brothers and sisters, the court said:

The record in this case amply evidences a confidential relationship. Among several factors which indicate a confidential relationship are kinship, advanced age and poor health, taken together with evidence of trust. . . . The record here clearly shows the family kinship as parent-child and brother-sister and the status of the father's age and health. It is also clear as to the confidence and trust which the father confided in his son, Lee Hatton, and as to the confidence and reliance the appellees placed in their brother that he would fulfill his assurances that he was holding the property in question for the benefit of the appellees as heirs to their parents' estate.

Id. at 458-59.

Perhaps the most persuasive evidence of the existence of the alleged oral agreement is where the defendants, or least one of them, actually admits the deal. That fortunate occurrence transpired in *Silver v. Silver*, 219 A.2d 659 (Pa. 1966). In *Silver*, a widow intending to remarry and fearful that her property might pass to the heirs of her betrothed, deeded her property to her two sons without consideration a week prior to her marriage. The sons orally agreed to reconvey the property to her upon demand. Some eleven years later, after the death of her second husband and the death of one of the two sons, she requested return of the property. The administratrix of the deceased son refused the request, and Ms. Silver brought suit to establish a constructive trust on the property. Her surviving son admitted the oral promise to reconvey and agreed to comply with a court order enforcing it. See *id.* at 661. The court entered judgment for Ms. Silver, and the administratrix appealed. The Supreme Court of Pennsylvania affirmed the judgment below with the following language:

We must therefore conclude, as did the chancellor and the court en banc, that the natural confidence inspired by the mother-son relationship, along with the evidence that the mother depended upon her sons for advice and customarily abided by their decisions in matters of this sort, as well as the

claimants have continued to contribute momentarily to the property held by the defendant. Unless there is plausible evidence that the claimant intended to make a gift to the defendant, continued contributions to the property give strong support to the assertion that the claimant has an interest in that property. For example, in *Miller v. Huebner*,⁵⁷ two sisters had filed an affidavit asserting an equitable interest in property held by their brother. The brother then brought suit contesting the affidavit and to remove the cloud on the title to the real estate. The property had been acquired in the brother's name in 1947, at which time he had assumed the position of head of the household because of the illness of both his mother and father, who had become virtually helpless and incapacitated. The evidence at trial demonstrated that the sisters had limited education, having quit school in the seventh grade to help at home, that they had a limited grasp of the English language, and that they felt obliged to follow their brother's orders as head of the family. The land in question, a 276 acre tract, was purchased as a result of a decision made at a family meeting in 1947. The brother and the two sisters pooled their money to make the down-payment and agreed to work jointly to pay off the balance. Over the years, until 1965, the sisters worked the farm without pay for the mutual benefit of all, and any money earned by them was turned over to their brother for the family good. When the brother married in 1965, he repudiated the oral agreement and declared himself the sole owner of the property. In sustaining the trial court's imposition of a constructive trust on the property in favor of the two sisters, the court opined that "[a] confidential relationship is clearly evident in the record" and that the relationship "poses a classic case for the imposition of a constructive trust."⁵⁸

An interesting factor supporting the plausibility of the oral agreement to reconvey property arises when the clear purpose of the conveyance is to mislead or defraud a third party. A case in point is *Kostelnik v. Roberts*,⁵⁹ which also presents a good example of the extension of a familial confidential relationship to a person only distantly related by marriage. The plaintiffs were an elderly couple who had decided to enter a convalescent home. The defendant, who had agreed to help make the appropriate arrangements, advised them that in order to qualify for state medical benefits they could not own any property at the time they were admitted to the home and that any property they did own would be taken from them. Defendant suggested that they put the property in his name to protect it, and he promised to return it to them if they got well. The court affirmed the trial court's judgment imposing a constructive trust on the property. The court found that evidence of a confidential relationship

particular state of mind of Mrs. Silver at the time of the conveyance, adequately establishes that a confidential relationship existed.

Id. at 662.

57. 474 S.W.2d 587 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

58. *Id.* at 592.

59. 680 S.W.2d 532 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

between the parties was "clearly evident" from the trial record. At trial, the plaintiffs had testified that the defendant was "'real close to us,'" "'like a son,'" and "was 'related through marriage.'"⁶⁰ The defendant was a beneficiary in their will under which they had left to him everything they owned. Ample evidence of a close personal relationship was also supported by the fact that the defendant over time had made bank deposits and paid bills for the plaintiffs and was an authorized signatory on both their checking and savings accounts. Although the defendant denied the existence of the agreement, he defended that any such agreement would be unenforceable because the conveyance to him, as alleged, was for purposes of defrauding the state. This illicit purpose, he asserted, deprived the plaintiffs of the "clean hands" necessary to obtain the equitable remedy of a constructive trust. The court properly rejected this argument on the basis that a clean hands defense may be raised only by a party injured by the alleged wrongful conduct.⁶¹

Although, the "oral trust" cases probably comprise the most common type of familial, confidential relationship litigation, a second recurring type involves situations where the plaintiff has found himself in unfortunate circumstances and a family member takes advantage of the plaintiff's plight by cheating him out of money and property. In these cases, the dire need of the claimant coupled with transactions unreasonably beneficial to the family member provide strong evidence of an abuse of a confidential relationship. For example, in *Texas Bank & Trust Co. v. Moore*,⁶² the administrator of the estate of an aunt brought suit against her nephew for breach of fiduciary duty and to recover money and real estate in the nephew's possession. The property had been euchred from the aunt by the nephew over a five-year period while she was in a convalescent center suffering from her last illness. She was over ninety years of age, was seriously incapacitated, suffered from impaired hearing and eyesight, and had reached a "state of confusion." There was independent testimony in the trial record from a private nurse of the aunt to the effect that the nephew would from time-to-time persuade her to sign papers by representing that it was necessary for hospital matters, to repair her house, or for nurses to be paid. In reality some of these papers gave the nephew power over her bank accounts, which after her death he closed and transferred the monies therein to his own personal accounts. On these facts, the trial court

60. *Id.* at 534.

61. Nor should the defense of illegality have aided the defendant. Although the general rule is that illegal contracts, including those acting as a fraud on a third party, are void as against public policy and that the courts will neither enforce nor undo them but rather leave the parties as it finds them, relief will be given to the more innocent party where their fault is not equal. See *Bamman v. Erickson*, 41 N.E.2d 920, 922 (N.Y. 1942) (allowing recovery in restitution to the assignee of a "casual" bettor against a professional gambler for payment of illegal gambling debts). In the *Kostelnik* case, the plaintiffs clearly were acting on the defendant's advice and relied strongly on his counsel and, thus, should be considered at lesser fault. Cf. *Carnival Leisure Indus., Ltd. v. Aubin*, 938 F.2d 624 (5th Cir. 1991) (applying Texas law and denying recovery on check written by defendant lawyer for illegal gambling debts).

62. 595 S.W.2d 502 (Tex. 1980).

found a confidential relationship existed as a matter of law. The burden of proof of showing the fairness of all transactions with his aunt was thus placed on the nephew and, upon his failure to carry that burden, actual and punitive damages were awarded against him for breach of his fiduciary obligation. In affirming the judgment of the trial court, the Supreme Court of Texas reasoned that when the nephew accepted gratuitous transfers by his aunt during her period of incapacitation he "consented to have his conduct measured by the standards of the finer loyalties exacted by the courts of equity."⁶³

Of course, the plaintiff need not be in dire circumstances at all for a trusted family member to wrongfully deprive him of money or property rightfully his. It is quite easy for one who holds the trust and confidence of another to defraud that other. Fraud itself, with or without an accompanying fiduciary relationship, is a recognized ground for invoking equity jurisdiction and for imposing a constructive trust.⁶⁴ When the defense to the fraud action, however, is the running of the applicable statute of limitations and a fiduciary or confidential relationship does exist between the parties, the courts commonly use that relationship to delay accrual of the statute until such time as the aggrieved party actually discovered the fraud. The theory is that the trust and confidence he placed in the defendant reasonably delayed inquiry into the underlying facts and, thus, justified his failure to discover the fraud. For example, in *Edsall v. Edsall*,⁶⁵ a son brought suit against his father for recovery of an additional portion of a herd of cattle which had been inherited by the son and father as part of the community estate of the mother and wife. The father had fraudulently misrepresented to his son that a substantial portion of the herd was his separate property owned before his marriage. Several years passed before the son acquired actual knowledge that the entire herd was part of the community estate. In affirming the judgment of the trial court granting the son an undivided interest in the herd, and in response to the statute of limitations argument of the father, the court noted that at the time of the father's fraudulent misrepresentation:

63. *Id.* at 509; *see also* *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). In *Miller*, a former wife brought action against her former husband to rescind a shareholder's agreement regarding corporate stock allegedly not disposed of by their divorce decree. Her former spouse had persuaded her to sign the agreement without disclosing to her that a third party had agreed to purchase the shares for a price in excess of \$700,000. The court held that the fiduciary duty arising from their confidential relationship had imposed upon him the burden of showing that the agreement was fair to her, which he had failed to do. During their marriage, the former husband had handled all of the family business affairs. The shareholder's agreement had been signed by the claimant as part of a "friendly" divorce suit, and she testified that she had trusted her former husband in business matters at the time of the divorce.

64. *See Consolidated Bearing & Supply Co. v. First Nat'l Bank*, 720 S.W.2d 647, 649 (Tex. App.—Amarillo 1986, no writ) ("Even without a confidential relationship, actual fraud by one party may also justify the imposition of a constructive trust."); *see also* *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974).

65. 238 S.W.2d 285 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.).

a relation of complete trust and confidence existed between plaintiff and his father, that is to say, plaintiff then reposed in his father complete confidence and trusted him implicitly, and he had no reason to, and did not, doubt the rectitude of any representation so made to him by his father.⁶⁶

This trust and confidence excused any inquiry by the son into the *bona fides* of the father's misrepresentations and prevented accrual of the statute until such time as the son acquired actual knowledge of the fraud.

The unfortunate predicament of the claimant need not be incapacitation resulting from old age or ill health, but may take the more mundane form of financial problems or an unfamiliarity with business matters. For example, in *Oak Cliff Bank & Trust Co. v. Steenbergen*,⁶⁷ a sister brought action against her deceased brother's estate requesting the equitable remedies of an accounting and a constructive trust on assets of the estate for sums of money that she had given to her brother. The sister's husband had died of a stroke and, over the subsequent period of some thirteen years, she had relied on her brother to manage her estate and property. The evidence at trial demonstrated that she placed complete reliance in her brother with respect to these matters, that she had given him her power of attorney, and that he was authorized to sign checks on her bank account. The evidence demonstrated numerous transactions in which he wrongfully used her funds to his own personal benefit. On these facts, the court affirmed the trial court's finding of a confidential relationship between the brother and sister and the imposition of a constructive trust on assets of the estate.

B. FRIENDSHIPS

Of Social Interaction and Meretricious Doings

In relationships that are other than familial, it is much more difficult to demonstrate the kind of trust and confidence that is necessary to establish a confidential relationship. If the relationship is indeed a positive one, we call it, for lack of a better word, friendship. But this word "friendship" embodies much too broad a general concept to provide a reliable basis for the imposition of fiduciary obligation. The term "friend" describes someone with whom one shares a relationship that may vary from something slightly more than bare acquaintance to one in which the parties indeed share an abiding trust and confidence.⁶⁸ Certainly, then, friendship at one extreme can provide the foundation for the finding of a confidential relationship. That friendship at a minimum must be personal in nature, involving social interaction between the parties. A longstanding business relationship, even if the parties are described as friends, is simply

66. *Id.* at 287.

67. 497 S.W.2d 489 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

68. See WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2d ed. 1983) (defining "friend" as "a person whom one knows well and is fond of; intimate associate; close acquaintance, applied loosely to any associate or acquaintance, or, as a term of address, even to a stranger.").

not sufficient. A seminal case on point is the previously discussed decision of the Supreme Court of Texas in *Thigpen v. Locke*.⁶⁹ In that case, despite the parties having become close friends and having engaged in numerous business transactions over the years, the court affirmed the judgment of the trial court directing a verdict that no confidential relationship existed between the parties.⁷⁰ The evidence indicated nothing more than that the parties had a quite friendly, but quite impersonal, business relationship.

Similarly, the lack of a sustained personal, social interaction between the parties dictated the negative finding by the court in *Horton v. Harris*.⁷¹ The parties had shared a friendship extending over nearly a half century and involving succeeding generations of their respective families. Long after the relationship had become firmly established, the plaintiffs suffered financial difficulties and were unable to continue payment on the mortgage on their home. Upon the request of the plaintiffs, the defendants came to their aid by paying the mortgage and taking the deed in their name. They then allowed the plaintiffs to continue living on the property under a tenancy at will. After several years, the plaintiffs brought suit seeking a constructive trust on the property and alleging that the defendants had orally promised to reconvey the property to them. In a detailed opinion closely examining the lengthy relationship between the parties and their respective families, the court affirmed the judgment of the trial court refusing to find a confidential relationship. It was clear from the record that the interaction between the parties and their families over the years, albeit quite friendly, had always involved arm's length business matters. Accordingly, despite that "long-standing friendship,"⁷² the record did not demonstrate "such evidence of justifiable trust and confidence as will create a fiduciary relationship."⁷³

Further, the necessary relationship must be current and ongoing at the time of the transaction at issue. For example, in *Dodson v. Kung*,⁷⁴ the relationship between the parties early on was an extremely close and personal one, "described as both father/son and mentor/protege."⁷⁵ However, that relationship was formed when the plaintiff was but a "boy." It did not continue later on while plaintiff went off to college, graduated, and established himself in business. Some twenty years passed before the parties came together again in the transaction at issue in which they established a new corporation, employing the plaintiff as president and granting him a block of the corporation's stock. Over two years later, the

69. 363 S.W.2d 247 (Tex. 1962); see also *supra* text accompanying note 27.

70. See also *Hansen v. Christie*, 132 S.W.2d 910, 914 (Tex. Civ. App.—Galveston 1939, no writ). (Although plaintiff alleged he and defendant had become "close friends" and "he trusted" defendant, "mere fact that they were friends would not constitute a fiduciary relationship.").

71. 610 S.W.2d 819 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

72. *Id.* at 824.

73. *Id.* at 823.

74. 717 S.W.2d 385 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

75. *Id.* at 387.

plaintiff became dissatisfied with how the corporation was being run, resigned, and brought suit against the defendant alleging a breach of an oral promise to repurchase the stock for \$100,000. The defendant denied the agreement and raised the defense of the statute of frauds. The plaintiff sought to contravene this defense based on an alleged confidential relationship with the defendant. The court on appeal affirmed the trial court's summary judgment finding that no confidential relationship existed between the parties at the time of the transaction at issue. The court noted that despite the fact that the "relationship at issue was one of business and friendship,"⁷⁶ at the time of the transaction at issue the plaintiff was no longer regarded by the defendant as either a son or protégé. The plaintiff had become a sophisticated business person, and there was "no evidence that these men were not dealing at arm's length and on equal terms"⁷⁷ at the time of the alleged oral promise.

What is clear, then, is that for friendship to provide the basis for a confidential relationship the friendship must involve current close personal and social interaction. When the courts do base a confidential relationship on friendship, they uniformly emphasize these elements of the relationship.⁷⁸ Of course, friendship, no matter how close and personal, does not in and of itself establish the fiduciary obligation of one of the parties. The core issue, always, is whether under the facts and circumstances the party claiming a confidential relationship was reasonably justified in reposing trust and confidence in his friend to guard and protect the claimant's interest with respect to the transaction at issue. Unlike in the familial relationship cases, where the reasonableness of the trust reposed may often be presumed from the relationship itself, in friendship cases, even close, personal ones, other factors are usually necessary to demonstrate that reasonableness.

In *Kalb v. Norsworthy*,⁷⁹ for example, the critical element, in addition to friendship, was that the plaintiff had assumed a position of control over his friend's, the defendant's, financial affairs. The action involved a suit by an accountant on a promissory note that was absolute on its face. The defendant sought to show that the note was for services not performed

76. *Id.* at 389.

77. *Id.*

78. See, e.g., *Frown v. Blank*, 425 A.2d 412, 418 (Pa. 1981) ("close social relationship"); *Horton v. Robinson*, 776 S.W.2d 260, 265 (Tex. App.—El Paso 1989, no writ) ("long-time friends"); *Dominguez v. Brackey Enter., Inc.*, 756 S.W.2d 788, 791 (Tex. App.—El Paso 1988, writ denied) ("good social friends"); *Dodson v. Kung*, 717 S.W.2d 385, 387 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) ("father/son and mentor/protégé"); *Garcia v. Fabela*, 673 S.W.2d 933, 935 (Tex. App.—San Antonio 1984, no writ) ("close friends and personal confidants"); *Adickes v. Andreoli*, 600 S.W.2d 939, 945 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ dismissed) ("close personal friends"); *Bush v. Stone*, 500 S.W.2d 885, 887 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) ("as if he were a member of his own family"); *Kalb v. Norsworthy*, 428 S.W.2d 701, 705 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) ("close personal friendship"); *Holland v. Lesesne*, 350 S.W.2d 859, 861-62 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) ("warm personal friends"; "unusually close personal friendly and confidential relationship").

79. 428 S.W.2d 701 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

and alleged a confidential relationship with the plaintiff. The note was given while the defendant was in the midst of a divorce proceeding and reflected charges for accounting services that would be performed by the plaintiff only in the event that the divorce went to trial. The plaintiff had persuaded the defendant to sign the note, advising him that if his divorce went to trial the note would be used as evidence of accounting expenses incurred for plaintiff's services in preparing reports for trial and for trial testimony. The evidence demonstrated that, in addition to plaintiff's being defendant's accountant, the parties had a long standing personal relationship, that they often visited in each other's homes, and that the defendant had been the plaintiff's best man at his wedding.

The court on appeal reversed the directed verdict of the trial court for the plaintiff, concluding that a fiduciary relationship existed between the parties. In support of its conclusion, the court noted that the defendant "was accustomed to being guided by the judgment or advice of [the plaintiff] in legal and accounting matters relating to income taxation."⁸⁰ That fact, coupled with the parties' close personal friendship, justified the defendant "in placing confidence in the belief that [plaintiff] would act in his best interest."⁸¹

Similarly, in *Bush v. Stone*,⁸² the claimant was allowed to avoid the running of the statute of limitations and to maintain a fraud action against the defendant because the confidential relationship between the parties excused an early discovery of the defendant's machinations. The parties had engaged in an ongoing business arrangement, in the course of which the plaintiff had allowed the defendant complete control of the record keeping of income and expenses. Although a careful examination of the financial reports given plaintiff by defendant might have led to an early discovery of the defendant's fraud, the close personal relationship between the parties justified the plaintiff's trust in defendant and his failure to examine the financial reports more closely. The court thus reversed the trial court's judgment dismissing plaintiff's cause of action, holding that the evidence amply demonstrated a confidential relationship

80. *Id.* at 705.

81. *Id.* See also *Dominguez v. Brackey Enter., Inc.*, 756 S.W.2d 788, 791 (Tex. App.—El Paso 1988, writ denied) ("Where a party is accustomed to being guided by the judgment or advice of another in legal and accounting matters relating to income taxation, and there exists a long association in a business relationship, as well as a personal friendship, the first party is justified in placing confidence in the belief that the other party will act in his best interest."); *Horton v. Robinson*, 776 S.W.2d 260, 265 (Tex. App.—El Paso 1989, no writ) ("A layman would be expected to rely upon one who was an attorney when a new business was started, particularly when they were long-time friends and an attorney-client relationship had previously existed."); *Pope v. Darcey*, 667 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (In *Pope*, the court canceled earnest money contract under terms of which plaintiff was to purchase property from deceased, who had inherited it from his sister who was a former client of attorney plaintiff. Plaintiff was intimately familiar with the property from years of representing deceased's sister, and a confidential relationship existed with deceased, who was an elderly man not in complete possession of his faculties, where there was both dominance on the part of plaintiff and weakness coupled with trust on the part of defendant).

82. 500 S.W.2d 885 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).

between the parties based on a close, personal friendship that had lasted some twenty-six years. The evidence showed that over this period the parties had continual social contact, often visiting each other's homes and going on hunting trips together. The plaintiff had testified that he "trusted the defendant the same as if he were a member of his own family."⁸³

Just as in the familial cases, the close personal relationship cases often involve actions for breach of an oral promise to hold property in trust for the claimant or to reconvey it to him. As was noted previously, the relationship of the parties in these "oral trust" cases must be coupled with persuasive evidence of the believability of the oral promise in order to persuade the court to contravene the deed or contract of conveyance.⁸⁴ In *Tuck v. Miller*,⁸⁵ for example, that evidence was in the form of Tuck's having acquired title to the property at a small fraction of its value, the cost of refinancing the unpaid mortgage. The Millers had been experiencing dire financial circumstances, were unable to make their mortgage payments, and could not obtain a loan to refinance the property. Tuck agreed to take title to the property in his own name, refinance it, and reconvey it to the Millers upon reimbursement for his expenses. In his alleged words: "What are friends for if they can't help you?"⁸⁶ The evidence at trial amply demonstrated a long-standing personal friendship between Tuck and the Millers.

In *Holland v. Lesesne*,⁸⁷ the parties, two families, had also been "warm close personal friends"⁸⁸ for many years. They decided to buy property together for joint weekend outings. They agreed to take title to the property in both their names and to own it jointly. They found an apparently ideal site with two houses on the property, and Mr. Holland undertook to handle the arrangements for its purchase. Without the knowledge of the Lesesnes, however, Mr. Holland took title to the property solely in his name. Some months later, after Holland attempted forcefully to dispossess the Lesesnes, they brought action seeking a constructive trust on their interest in the property. The court affirmed the trial court's judgment granting a constructive trust in favor of the Lesesnes based on a confidential relationship evidenced by a close personal relationship over many years in which the families visited each other regularly, often dined together, and regularly vacationed together. But most importantly, persuasive evidence of the oral agreement between the parties was demonstrated by the fact that the Lesesnes lived in one of the houses on the property for several months without objection from the Hollands, and

83. *Id.* at 887.

84. *See supra* note 48 and accompanying discussion.

85. 483 S.W.2d 898 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

86. *Id.* at 905; *see also* *Garcia v. Fabela*, 673 S.W.2d 933 (Tex. App.—San Antonio 1984, no writ) (involving breach of promise to reconvey home to plaintiff under circumstances where plaintiffs had known and trusted defendants as close friends and personal confidants for approximately 20 years prior to the transaction at issue).

87. 350 S.W.2d 859 (Tex. Civ. App.—San Antonio 1961, no writ).

88. *Id.* at 860.

apparently without payment of rent, and that the Lesesnes had incurred substantial costs in making improvements on the property.⁸⁹

The elderly, when infirm, lonely, and otherwise vulnerable, are inviting targets for the exercise of the kind of undue influence by perceived friends that is in many cases the hallmark of a violation of a confidential relationship. Actual fraud is often an unnecessary artifice to the wrongdoer in these cases because the trust reposed in him itself enables him to persuade his victim that a transaction or other dealing is a good move for the victim. Nondisclosure, misrepresentation, or tainting the true facts, other than the wisdom of the deal itself, is unnecessary. In *Frowen v. Blank*,⁹⁰ for example, Frowen brought action to rescind the sale of her farm alleging both fraud and breach of a confidential relationship. The Supreme Court of Pennsylvania agreed with the court below that she had failed to prove fraud, having had full knowledge of the operable facts pertaining the transaction of sale, but reversed and remanded, finding that a confidential relationship existed between the parties at the time of the transaction. The only issue on remand was to be the contested fairness of the transaction of sale, with the burden of proof resting on the defendant Blank as a fiduciary. Blank had purchased the seventy acre farm from Frowen for \$15,000, but evidence in the trial record showed that the fair market value of the farm at the time of the transaction was \$35,000. Ms. Frowen had retained a life interest in the house and garden on the property, as well as any income from the gas lease. A "close social relationship" and "long friendship"⁹¹ had developed between the parties prior to the transaction at issue. At the time of the execution of the agreement Ms. Frowen was eighty-six years old and had been suffering from a loss of hearing and eyesight. She was a widow with little formal education and little knowledge of business matters. The defendant and his wife had purchased the farm next to hers and over the years a close social relationship developed between the widow and the young couple with Ms. Frowen teaching the neighbors about farming and they in turn helping her with chores and driving her to local social events. They also customarily celebrated birthdays together.⁹²

Undoubtedly, the clearest case for finding a confidential relationship based upon friendship is where the parties are not related by blood or marriage but have, in essence, become members of the same core family unit. In *Turner v. Miller*,⁹³ a guardian of an elderly mental incompetent, Bertha Miller, who was an eighty-two-year-old widow rancher, brought suit against George Turner. For many years Miller's business and personal affairs had been managed by her only son, who died in 1974. Miller became despondent and lived alone. During this period she met Turner, to whom she sold all of her cattle and a grass lease upon which to graze

89. See *id.* at 860-62.

90. 425 A.2d 412 (Pa. 1981).

91. *Id.* at 417, 418.

92. See *id.* at 417.

93. 618 S.W.2d 85 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.)

them. She also granted Turner and his wife an option to purchase both surface and mineral rights in a portion of her property at a price of \$80 an acre. Over a short period of time there developed a close family-like relationship between the Turners and Mrs. Miller, who considered and treated the Turners as her own children. Some two months after their initial acquaintance, she gave George Turner her general power of attorney and later on gave one to Mrs. Turner as well. Ultimately the Turners moved out of their trailer, which was located on Mrs. Miller's property, and moved into her home because her health was declining and she needed someone to take of her. By this time the Turners were handling most of Mrs. Miller's business affairs and had opened joint bank accounts with her. There was testimony at trial that Miller was drinking excessively through these years and had suffered related complications and that she had been hospitalized some fifty or sixty times since her husband's death for her drinking problem. In the words of the court, this problem "had rapidly advanced her natural senility."⁹⁴ Ultimately, Miller conveyed to the Turners her ranch, worth more than \$400,000, in return for the Turners assuming the mortgage balance of \$34,000 and their promising to pay her the sum of \$1000 a month for the balance of her life. Additionally, as the new owners of the ranch, the Turners began receiving gas royalties of approximately \$40,000 while paying Mrs. Miller the promised \$1000 a month. On these extraordinary facts, the court demonstrated no difficulty in affirming the trial court's judgment setting aside the deeds on the basis of breach of a fiduciary relationship. As profiting fiduciaries, the Turners suffered the presumption that transactions with their beneficiary were presumed unfair, and their failure to rebut that presumption justified the trial court's judgment.⁹⁵

Another emotionally-compelling case is *Swain v. Moore*,⁹⁶ in which an elderly man who lived alone befriended a neighboring family. Over time, he became extremely popular with the family, especially since he owned a television set, which the court termed the "latest popular American vehicle of amusements."⁹⁷ This relationship continued to develop for more than a year. During this period Swain gratuitously transferred money and property to the Moores in the form of savings bonds, title to his automobile, and money to buy dirt and bathroom fixtures. Ultimately, he gave the Moores \$2700 in exchange for an oral promise that he would be allowed to continue to live with them in their home. However, soon after he moved in, the relationship between the parties disintegrated. Swain moved out of the house and brought action to recover from the Moores the money and property that he had transferred to them. The court gave judgment for Swain, finding ample evidence of a fiduciary relationship between the parties. The evidence showed that Swain, before meeting

94. *Id.* at 87.

95. *See id.* at 86-88.

96. 71 A.2d 264 (Del. Ch. 1950).

97. *Id.* at 265.

the Moores, was a lonely old man who lived alone and that he lacked a strong association with his own family.⁹⁸ The court determined that he was, thus, a particularly vulnerable target for exploited affection. The burden was on the Moores as fiduciaries to demonstrate the fairness of the various transactions at issue and, given the fact that they gave no consideration for the property transferred to them, they clearly failed to carry that burden.⁹⁹

Finally, extra-marital or other meretricious relationships offer fertile ground for establishing confidential relationships based on "friendship."¹⁰⁰ Love, whether or not reciprocated, can be a very expensive commodity, as is well demonstrated by *Sharp v. Kosmalski*.¹⁰¹ Upon the death of his wife of thirty-two years, Sharp, a fifty-six-year-old dairy farmer with an eighth-grade education, developed what the court termed a "very close relationship" with Kosmalski, a forty-year-old school teacher. Kosmalski began helping the inaptly-named Sharp with various domestic matters, including disposing of his deceased wife's belongings. Over time, Sharp became quite dependant on Kosmalski and ultimately declared his love for her. She, however, refused his proposal of marriage, but continued to permit him to shower her with gifts with the hormonally heightened hope that she could be persuaded to change her mind. He gave her access to his bank account, from which she withdrew substantial amounts of money. He also named her as sole beneficiary of his will and executed a deed naming her joint owner of his farm. Ultimately, he also transferred his remaining interest in the farm to her. It took a few years, but after his assets had been reduced to some \$300, she ordered him off the farm and took possession of it and all of the equipment thereon.

Braving the notoriety of a public trial, Sharp sued Kosmalski, but to his undoubted chagrin, his complaint was dismissed by the trial court, a decision that was affirmed without opinion on appeal. To his good fortune, the Court of Appeals of New York took mercy, found that the above facts did indeed state a cause of action based on breach of a confidential relationship, and remanded the case for another public trial. In response to Kosmalski's prepubescent-like assertion that she had breached no *express* promise to Sharp, the court concluded that, given the fiduciary relationship between the parties, an implied promise by Kosmalski to hold the

98. See *id.* at 265-67.

99. See *id.* at 267.

100. See, e.g., *Artache v. Goldin*, 519 N.Y.S.2d 703 (N.Y. App. Div. 1987) (viable claim was stated to prevent unjust enrichment by imposing constructive trust on family residence held in defendant's name pursuant to oral agreement whereby parties agreed to live together as husband and wife, had done so for 14 years, and had shared family residence with their four children for a period of nine years.); *Muller v. Sobol*, 97 N.Y.S.2d 905 (N.Y. App. Div. 1950) (although meretricious relationship between parties living together as man and wife for over 20 years was not to be condoned, it could not be said that a confidence between the parties did not arise from that relationship so that agreements between them would be enforced, despite the lack of a writing, in order to prevent unjust enrichment).

101. 351 N.E.2d 721 (N.Y. 1976).

property for Sharp's benefit was fairly suggested by the facts.¹⁰²

C. BUSINESS RELATIONSHIPS

Of Near Joint Venture and Failed Fraud

Except for the formally-recognized fiduciary relationships, such as attorney-client and doctor-patient, a business relationship is the antithesis of fiduciary obligation. It is the hallmark of a business relationship that each party expects to benefit thereby and that each looks to that end and otherwise to his own self-interest. Accordingly, the rule is well settled everywhere that a business relationship, no matter how long and cordial its duration,¹⁰³ does not give rise to fiduciary obligation. It is perhaps

102. See also *Williams v. Lynch*, 666 N.Y.S.2d 749 (N.Y. Sup. Ct. 1997) (in action for constructive fraud, woman's testimony, viewed favorably, indicated confidential relationship with longtime cohabitant, that cohabitant had taken unfair advantage of her confidence to assume control over their financial affairs, and that she justifiably trusted him with respect to handling such affairs, so that cohabitant would bear burden of showing no deception had been practiced regarding alleged oral agreement entered into prior to their breaking up that she could have lifetime use of his home); *White v. Lamborn*, Civ. A. No. 4471, slip op. at *4, *5 (Del. Ch. Jan. 3, 1978) (wherein constructive trust imposed for return of farm to plaintiff where he had conveyed farm to defendant during extra-marital sexual relationship with her which had begun when he was 74 years of age!; farm had been sold to her for less than half its value and a confidential relationship between the parties was demonstrated by evidence of his age, of his love for her, that he came to her for support and advice, that he had appointed her executrix of his estate and that he had given her his power of attorney).

In *Williams v. Lynch* a vigorous dissent opined:

Stripped of all bold conclusory claims and strained legal theories, the factual allegations of the amended complaint and the evidence adduced on defendant's motion for summary judgment tell nothing more than a story of a relationship gone bad and a cohabitant's effort to obtain the kind of postdissolution monetary distribution that traditional mores and established New York law reserves to spouses.

Id. at 753.

103. See *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1038 (4th Cir. 1997) (business relationship of long and cordial duration insufficient standing alone to establish confidential relationship); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992) (relationship between franchisor and franchisee for a period of over forty years insufficient to establish fiduciary obligation); *Consolidated Bearing & Supply Co., Inc. v. First Nat'l Bank*, 720 S.W.2d 647, 650 (Tex. App.—Amarillo 1986, no writ) (long-standing relationship between bank and its valued customer insufficient to establish fiduciary obligation); *Winston v. Lake Jackson Bank*, 574 S.W.2d 628, 629 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (claim of extensive prior dealings alleges no specific facts to demonstrate confidential relationship); *Barnett v. Matz*, 483 S.W.2d 315, 319 (Tex. Civ. App.—Austin 1972, no writ) (extensive prior business dealings between parties insufficient to establish a confidential relationship).

Many of the cases in which the courts have refused to find a confidential relationship based upon business dealings, particularly those in which the relationship has been of long duration, have resulted in the courts emphasizing that a particular type of business relationship does not achieve the status of a formal fiduciary relationship. In *Crim Truck*, for example, the court held specifically that a franchisor does not owe fiduciary duties to a franchisee, and the court cited over a dozen cases from other jurisdictions reaching that conclusion. See *Crim Truck*, 823 S.W.2d at 595 n.5. Similarly, in *Consolidated Bearing* the court held that the long-standing relationship between a bank and its valued customer did not give rise to a confidential relationship. See *Consolidated Bearing*, 720 S.W.2d at 650; see also *Thomson v. Norton*, 604 S.W.2d 473 (Tex. Civ. App.—Dallas 1980, no writ) (relationship of bank and customer is not a confidential relationship). The bank cases are

typical of many ongoing business relationships that the parties have nurtured a well-developed trust and confidence in each other. However, the oft-stated rule is that a "mere subjective trust" is not of the kind that will create a confidential relationship.¹⁰⁴ The usual trust and confidence shared between business people is that each will act fairly and will honor the letter and spirit of mutual business transactions. When that trust fails, a breach of contract action may arise, but not the breach of a fiduciary obligation.

In the course of business relations, the cordiality attendant to the negotiation and performance of transactions may give rise to a certain "friendship" between the parties. It is inherent in many kinds of business relationships that one party may wine, dine, and entertain the other on a regular basis. This kind of interaction, however, indicates no more than what could be called a "business friendship," not the kind of close, personal friendship that the courts sometimes recognize as the basis for a confidential relationship.¹⁰⁵ Fiduciary obligation is firmly based on the justifiable expectation that the principal will look after the beneficiary's interests as well as his own. In business relationships, even quite friendly ones, the reasonable understanding of the parties is that each continues to give primary, perhaps exclusive, attention to his own interest.¹⁰⁶ The

merely a subset of a large body of case law uniformly holding that the relationship of creditor and debtor is not a confidential relationship. Indeed, in the watershed case of *Thigpen v. Locke*, referred to throughout this article, an important part of the court's holding was that, absent extraordinary facts to the contrary, the relationship of creditor and debtor is not a confidential relationship. See *Thigpen*, 363 S.W.2d at 253; see also *Ed Schory & Sons, Inc. v. Society Nat'l Bank*, 662 N.E.2d 1074, 1081 (Ohio 1996) (mere debtor/creditor relationship without more will not create a fiduciary relationship); *Hopewell Enter., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 817 (Miss. 1996) (since no fiduciary relationship exists between a debtor and creditor, no duty of confidentiality can be imposed on the creditor); *Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 656 P.2d 1089, 1093 (Wash. Ct. App. 1982) (lender is not a fiduciary of its borrower; a special relationship must develop between a lender and a borrower before a fiduciary duty exists); *Landes v. Sullivan*, 651 N.Y.S.2d 731, 734 (N.Y. App. Div. 1997) (relationship between a vendor and purchaser is simply a debtor/creditor relationship and does not give rise to fiduciary obligation); *In re Gertzman*, 446 S.E.2d 130, 134 (N.C. App. 1994) (relationship between debtor and creditor will not usually establish a fiduciary duty of the creditor); *Winston v. Lake Jackson Bank*, 574 S.W.2d 628, 629 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (relationship of debtor and creditor is not a fiduciary one; fact that bank president has been financial adviser to endorser of note established no more than a creditor/debtor relationship).

104. See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex. 1997); *Crim Truck*, 823 S.W.2d at 595; *Thigpen*, 363 S.W.2d at 253. The reason customarily given by the courts for refusing to find a confidential relationship in business relationship cases is that subjective trust alone will not establish the relationship. The "mere subjective trust" limitation is discussed *supra* following note 25.

105. A helpful and widely-cited discussion of the point is found in *Thigpen*. See *Thigpen*, 363 S.W.2d at 253. The case is discussed *supra* at note 27. The discussion describes a lengthy business relationship, with favors exchanged between the parties, and the headnote to the case describes the parties as "close friends." Nevertheless, despite the close business association extending over a number of years and over numerous transactions, the court correctly found that no confidential relationship existed between the parties.

106. The economic system in this country firmly rests on this proposition of which Adam Smith, if citation is necessary, is likely its best known proponent. See A. SMITH,

common law of contract by necessity mirrors this economic philosophy. The core function of contract law is to determine which among all promises will be given legal sanction. Generally speaking, the determination is that those promises supported by consideration will be enforced. In turn, consideration itself is defined in terms of whether the promisor received in exchange something she wanted. Consideration may be virtually anything imaginable, ostensibly valuable or even worthless, as long as it is that for which the promisor bargained.¹⁰⁷ Consistent with this definition is that the law of contract will not inquire into its adequacy.¹⁰⁸ In Hobbes's memorable words: "The value of all things contracted for, is measured by the appetite of the contractors: and therefore the just value, is that which they be contented to give."¹⁰⁹ Foreign to the bargaining process is the rational expectation that equitable principles will intervene to require full disclosure of known or likely adversity or that the transaction itself, if culminated, will be beneficial or even fair to one or both parties.¹¹⁰ These matters are left to the common law of fraudulent non-disclosure and to statutory laws protecting consumers. For these basic reasons, absent extraordinary circumstances, a business relationship cannot form the basis for the imposition of fiduciary duties.¹¹¹

Nevertheless, there are many cases in which the courts have found a confidential relationship between parties whose relational history has

WEALTH OF NATIONS (5th ed. London 1789) ("It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages," *quoted in* L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 42 (5th ed. 1990)).

107. See RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 79 (1981).

108. See *id.* § 79.

109. Hobbes, *Levithan*, Ch. 15, *quoted in* L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 43 (5th ed. 1990).

110. See *Trevino v. Sample*, 565 S.W.2d 93 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (evidence that property owners and creditor had dealt with each other over the years in arm's length transactions involving loans made to owners by creditor and that they trusted creditor implicitly was insufficient to establish a confidential relationship between property owners and creditor and thus there was no duty for creditor to disclose to property owners the disadvantageous aspects of a refinance loan that actually increased the debt amount, the monthly payment, and the interest rate).

111. It is especially in the business relationship cases that it is so hard to understand why the trial judge allows a case to go to trial on the issue of a confidential relationship when the only prior history between the parties is business oriented, short in duration, with nothing in the facts to indicate that one party would justifiably repose trust in the other. In such cases, after the time and expense of trial has been incurred, the judge is left with no choice but to enter a judgment notwithstanding the jury's verdict if indeed the jury finds in favor of a confidential relationship. A case in point is *Marut v. Collier*, 583 S.W.2d 682 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). In *Marut* the jury found in favor of a confidential relationship, and the trial judge's judgment notwithstanding that verdict was upheld on appeal. See *id.* Even more inexplicable, of course, are pure business relationship cases in which the trial judge sustains the jury's verdict finding a confidential relationship. See *Friedman v. Powell Elec. Mfg. Co.*, 456 S.W.2d 758 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (jury verdict finding confidential relationship reversed on appeal).

been exclusively business oriented.¹¹² The cases are extraordinary because business relationships clearly provide the least fertile ground for sustaining a confidential relationship. In each of the cases, however, the claimant has carried the heavy burden of showing that the normal rules and expectations of business behavior did not apply and that he was justified in his expectation that the party to be charged would protect the claimant's interests as well as his own.

112. An exceptional line of cases demands mention at this point. These cases use the theory of "quasi fiduciary relationship," as opposed to "confidential relationship" to impose fiduciary obligations on one party to a business transaction. The transaction is usually, but not always, a loan and the "quasi fiduciary" is the lender. In the typical case, during the course of loan negotiations, the borrower has requested that the loan be insured, either by mortgage insurance or by credit life insurance or both. Upon death or default of the borrower, the loan is discovered to be uninsured. In the ensuing litigation on the debt obligation, the courts find that the lender has violated a "quasi fiduciary" obligation by failing to obtain the requested insurance for the borrower, or by failing to advise the borrower that the borrower must obtain the insurance himself, or, in cases where mortgage insurance rather than credit life insurance has been provided, by failing to advise the borrower of the difference between the two types of insurance.

In these cases, it is clear that a confidential relationship does not exist between the parties because, in virtually all of the cases, there is no prior relationship or dealings between the parties to support a confidential relationship. In imposing this "quasi fiduciary" responsibility on the lender, the courts emphasize the complexity of the loan negotiation process and the related insurance options of the borrower, the ignorance of the borrower regarding such matters, the vastly superior knowledge of the lender, and the resulting justified reliance on the lender by the borrower to protect the borrower's interests regarding obtaining the insurance requested by the borrower. See *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79 (Miss. 1991) (where, based upon prior transactions with the borrower, lender knew or should have known borrower wished to obtain credit life insurance on all loans, question of fact existed as to whether lender violated a quasi fiduciary obligation by failing to notify borrower of the expiration of credit life insurance); *Stone v. Davis*, 419 N.E.2d 1094 (Ohio 1981), *cert. denied*, 454 U.S. 1081 (1981) (once borrower indicated desire for insurance coverage, lender violated quasi fiduciary obligation to borrower by not purchasing insurance for borrower or by failing to disclose that borrower would be required to procure the insurance himself); *Parnell v. First Sav. & Loan Ass'n*, 336 So. 2d 764 (Miss. 1976) (lender violated quasi fiduciary obligation by failing to obtain credit life insurance where borrower indicated desire for such insurance during loan negotiations); *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n*, 588 P.2d 1192 (Wash. Ct. App. 1978) (lender violated quasi fiduciary duty to distinguish for borrower difference between mortgage insurance and credit life insurance where mortgage insurance had specialized meaning in lending industry that it did not have elsewhere). See also *Boonstra v. Stevens-Norton, Inc.*, 393 P.2d 287 (Wash. 1964) (defendant, a company engaged in procurement and sale of real estate contracts and mortgages, possessed superior business knowledge and experience and had quasi fiduciary duty to disclose information of which customer was ignorant where customer justifiably relied on defendant's knowledge and experience). These cases are *sui generis* and are not authority for defining the parameters of confidential relationships. Indeed, the results in the "quasi fiduciary relationship" cases could be better understood by applying basic principles of contract or agency law. See generally Mark Budnitz, *The Sale of Credit Life Insurance: The Bank as Fiduciary*, 62 N.C. L. REV. 295 (1984) (rejecting the quasi fiduciary theory and suggesting that the lender should be considered an agent of the borrower and that the lender's responsibilities should be governed by traditional agency law).

The potential for confusing these cases with ones involving true confidential relationships is undoubtedly heightened by the wont of some courts to describe a "confidential relationship" as a "quasi fiduciary relationship." See *Liebergesell v. Evans*, 613 P.2d 1170, 1178 (Wash. 1980); *Brown v. Brown*, 563 S.W.2d 444, 446 (Ark. 1978); *Hatton v. Meade*, 502 N.E.2d 552, 557 (Mass. App. Ct. 1987); *Lee v. Lee*, No. 11-058, 11-67, 1986 WL 9656, at *6 (Ohio Ct. App. Aug. 29, 1986).

A recurring scenario is property based and is similar in many respects to the oral trust or reconveyance cases discussed previously in context with the familial and friendship cases. The claimant, asserting only a prior business relationship with the defendant, seeks to avoid one or both the parol evidence rule and the statute of frauds and to impose a constructive trust or other equitable remedy on property held by the defendant under a deed or other document of conveyance that purports to grant full title to the defendant. As previously discussed, the courts in these cases are understandably reticent to undermine the sanctity of written agreements absent compelling evidence supporting the believability of the alleged oral agreement and of the reasonableness of the claimant's expectation that the defendant would hold the property for the claimant's benefit. In the aforementioned discussion, that evidence was supplied, in part, by emotional factors pertaining to the trust and confidence understandably reposed in a close personal friend or family member. In the business relationship cases, however, emotional factors are usually absent. Nevertheless, the claimant is able to show plausible evidence of the alleged oral agreement based on prior transactions with the defendant similar to the alleged oral one. These prior transactions have allegedly justified the claimant in reposing the trust and confidence in the defendant that the transaction at issue would be handled in the same or similar manner.¹¹³ And, although the relationship between the parties is not a formal fiduciary one, such as that of partners or joint venturers, or of agent and principal, the courts use equity to impose a constructive trust, or an equitable lien, on the property at issue and, in appropriate cases, punitive damages against the defendant based on a justifiable trust and confidence reposed in him by the claimant with respect to the transaction at issue. As the basis for imposing equity in these cases, albeit something of a misnomer given the lack of a personal relationship between the par-

113. Prior transactions between the parties to the alleged oral agreement are critical to establishing the confidential relationship between them, and similar prior transactions are important, although not critical, evidence of the believability of the oral agreement. Evidence establishing the credibility of the oral agreement is necessary to persuade courts to contravene the integrity of the written instrument of conveyance. For instructive cases on these points, see *Consolidated Gas & Equip. Co. of Am. v. Thompson*, 405 S.W.2d 333 (Tex. 1966), and *Patton v. Callaway*, 522 S.W.2d 252 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.). In both these cases, plaintiffs sought to establish a constructive trust in an overriding royalty mineral interest based on the breach of an alleged oral agreement similar to that in *Gaines v. Hamman*, discussed *infra* at note 115. However, in both cases, unlike in *Gaines*, the alleged oral agreement was the initial transaction of that nature between the parties, although in *Patton* there had been two prior unrelated transactions between one of the plaintiffs and the defendant. Both cases denied recovery, finding no confidential relationship between the parties and refusing to enforce the oral agreement because of the statute of frauds. In *Patton*, the court buttressed its conclusion with the maxim that prior arm's length business transactions between parties do not establish a confidential relationship and that such a relationship must exist prior to and apart from the transaction at issue. In *Consolidated Gas*, the court reasoned that subjective trust of one business man in another does not establish the basis for the imposition of a constructive trust.

ties, the courts say that a "confidential relationship" existed between the parties at the time the defendant engaged in the illicit transaction.

An excellent case in point is *Gaines v. Hamman*.¹¹⁴ Gaines was a geologist, who over a five-year period entered into numerous transactions with Hamman, an oil and gas lease broker. In these transactions, Gaines would work up geological information on various tracts of land and identify those that showed promise for oil and gas exploration. In turn, Hamman would acquire leases on the properties, usually in his own name, and underwrite the necessary expenses. Hamman would then transfer the lease to third parties for production, retaining an overriding royalty interest. After Hamman's expenses had been recouped, the royalty would then be divided equally between Hamman and Gaines. In the transaction at issue, Hamman refused to share the override with Gaines, and the latter brought suit seeking to impose a constructive trust on it. The trial court granted summary judgment for Hamman. On further appeal, the court reversed and remanded the case for trial, holding that summary judgment was improper because Gaines's allegations properly raised a jury issue as to the existence of a confidential relationship with Hamman at the time of the transaction in question. The court opined that, if Gaines's version of the facts were found to be true, a confidential relationship "undoubtedly"¹¹⁵ existed between the parties and that, if a constructive trust were not imposed on the royalty interest, Hamman "would be the recipient of an unjust enrichment resulting from the breach of a confidential relationship."¹¹⁶

In reaching its decision in *Gaines*, the Texas Supreme Court relied heavily on its earlier decision in *MacDonald v. Follett*,¹¹⁷ a case with very similar relevant facts. In *MacDonald*, however, the alleged wrong did not occur until the renewal of the jointly-shared overriding royalty. As the time for renewal approached, the defendant advised the plaintiff of that fact and agreed to negotiate the renewal. He did so, but took it exclusively in his own name. On these facts, the court ruled that it would have "no difficulty"¹¹⁸ in finding that the "status existing between the parties was one of trust and confidence at the time of the lease renewal transaction at issue."¹¹⁹

114. 358 S.W.2d 557 (Tex. 1962).

115. *Id.* at 560.

116. *Id.* For a case reaching the same result on almost identical relevant facts, see *Hedley v. DuPont*, 580 S.W.2d 662 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (allegations of plaintiff geologist that he would use his expertise to evaluate prospective oil and gas properties for acquisition by defendants, who were to convey interests to plaintiff after a certain pay out for expenses, were sufficient to support proof of a confidential relationship as to properties in question and a breach of that relationship so that a constructive trust to prevent unjust enrichment could be imposed).

117. 180 S.W.2d 334 (Tex. 1944).

118. *Id.* at 337.

119. *Id.* at 338. The relationship of the parties in all these cases is very close to the formal fiduciary one of joint venturers. Joint venture is a rather mercurial legal concept which encompasses informal partnership relationships usually tied to a single transaction or an identical series of transactions. Joint ventures are said to require four distinct ele-

Although a demonstration of similarities between the transaction at issue and prior business transactions in which the defendant did hold property for the plaintiff's benefit may aid significantly in giving credibility to the alleged oral promise to hold property for the plaintiff, such a demonstration is not essential to persuading the court to contravene the deed or other conveyance document that gives title to the defendant. The believability of the alleged oral transaction can be proved in other ways. For example, in *Jarrett v. Hall*,¹²⁰ credence was supplied by facts pertaining to the conduct of the parties subsequent to the transaction at issue. Over a period of approximately ten years, the parties had a business relationship in which Hall sold railroad ties to Jarrett. It was Hall's practice to purchase tracts of timber land, occasionally with Jarrett's financial assistance, cut the timber into railroad ties, and sell the ties to Jarrett. The transaction at issue involved a tract of land that Hall sought to purchase for timber to supply Jarrett with ties. After negotiating a sales price, Hall approach Jarrett for a loan to finance the purchase. The parties entered into a preliminary agreement that Jarrett would finance the purchase if an inspection proved that the land had sufficient timber for Hall to repay the loan from its sale. Although many terms of the loan agreement were left open, it was clear that both parties understood that the timber would be the primary, but not the exclusive, source of repayment of the loan and that the land and any timber remaining after the loan was paid would belong to Hall. The inspection of the land proved positive and the parties moved forward to finalize the purchase. The sale transpired, and title was taken by Jarrett in his own name. This, however, was not inconsistent with the parties' understanding that once the loan was repaid, title would

ments: (1) a mutual right of control; (2) a community of interests; (3) a sharing of profits; and (4) a sharing of losses and expenses. See *Patton v. Callaway*, 522 S.W.2d 252, 256 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.). At times these requirements can be quite technical. See *Friedman v. Powell Elec. Mfg. Co.*, 456 S.W.2d 758, 763 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ) (no joint venture because, although there would have been "mutual" profit, it would not have been "shared" profit). In the shared override cases, the courts usually have not concerned themselves with explaining why the transactions do not qualify as joint ventures. In *Patton v. Callaway*, on similar but distinguishable facts, the court ruled that the transaction at issue did not qualify as a joint venture because there was no sharing of costs. In the instant cases, that reasoning is inapposite. A claimant who shares in the profit only after the other party has recouped his initial outlay for expenses has certainly "shared in those expenses." But regardless of whether one considers the conclusion against joint venture to be overly technical, it is clear that the parties in these cases share a "status" that is very close to a formal fiduciary one. It is thus not unduly surprising to find that relationship to be "confidential" even though arising entirely in a business context.

Other jurisdictions are no more precise than Texas in describing the requirements for a joint venture. The Nebraska Supreme Court, for example, has broadly stated that a joint venture arises when:

there [is] an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust the performance to the other.

Fangmeyer v. Reinwald, 263 N.W.2d 428, 434 (Neb. 1978).

120. 207 S.W.2d 261 (Tex. Civ. App.—Beaumont 1947, no writ).

be transferred from Jarrett to Hall. Hall then moved onto the land and lived there without objection from Jarrett and without paying rent for a period of four years. During this period Jarrett continually delayed taking any of the timber from which the loan was to be repaid. Jarrett then for the first time claimed ownership in the land and demanded rent from Hall. Hall brought suit, and the trial court entered judgment granting title to him subject to a lien in the amount of the loan due Jarrett. On appeal, the court affirmed the trial court judgment, reasoning that a confidential relationship existed between the parties at the time of the transaction at issue and that this relationship justified the imposition of a constructive trust on the property in favor of Hall.

In a carefully reasoned opinion, the court emphasized the uncontroverted evidence at trial that supported both the existence of the confidential relationship between the parties and the believability of their alleged oral agreement. The confidential relationship was evidenced by a lengthy period of harmonious dealing during which a business friendship developed between the parties such that they became accustomed to extending confidence and trust to each other in their business dealings. Further, it was clear from the record that Jarrett was the dominant party in their business dealings, given the fact that Hall was a man of little means and little formal education. The believability of the alleged oral promise by Jarrett was supported by the fact that their transactions over the years were typically informal in nature and that in these transactions Hall reposed trust and confidence in Jarrett that he would be treated fairly. Most importantly, the conduct of the parties subsequent to the purchase of the property at issue indicated strongly that they regarded Hall as the owner. Hall lived on the property in a cordial relationship with Jarrett for a period of four years without paying rent and without demand from Jarrett for such payment. Further, during this period Hall farmed the land for his own use and benefit and made various improvements to the property, including adding a shed to the barn, a new roof to the house, and maintaining the fences. Finally, Jarrett's taking title in his own name was in no way inconsistent with the alleged oral agreement that ownership would be transferred to Hall upon repayment of the loan. To allow Jarrett to take title to the property without advising Hall of his intent not to abide by his oral promise to reconvey would, reasoned the court, allow him to perpetrate a fraud upon Hall. Had Hall been made aware of Jarrett's undisclosed intent, he might well have made other arrangements for financing the property and acquired it in his own name.

Indeed, in all of the above cases, involving as they do the breach of an oral promise to reconvey all or part of an interest in property, the retention of the property by the defendant borders upon fraudulent wrongdoing. It would take little stretch of the law of fraud, particularly fraudulent nondisclosure, if any stretch at all in many cases, to find the defendant guilty thereof and to use that fraud, rather than a confidential relationship between the parties, as a basis for imposing equity jurisdiction. Per-

haps it would be best if these cases were left to the law of fraud, rather than confidential relationships, as the reason for invoking equity jurisdiction. Proceeding in this manner would certainly simplify an understanding of confidential relationships. Arguably, however, the better rule is as we have it. The law of fraud is based upon established legal principles and is far less flexible than the more fluid concept of confidential relationship. The fluidity of the latter better accommodates the policing function of equity of achieving fair results when more structured legal principles fail. The rule then should be, as it is, that even though a particular defendant has not technically been guilty of fraud, and even though the relationship with the plaintiff is purely business oriented, he has been guilty of the constructive fraud of violating a trust and confidence imposed in him by the plaintiff.

Regardless, this close correlation between actual fraud and the constructive fraud of breach of a fiduciary relationship has caused confusion in defining the parameters of confidential relationships. In many cases, where the defendant has clearly been guilty of a fraud that justifies the imposition of equitable remedies, the courts go too far by holding that a confidential relationship existed between the parties when nothing akin to such a relationship is presented by the facts. To properly understand the nature of confidential relationships, these overstatements by the courts must be sorted out and not taken at face value.

A case in point is the decision of the Supreme Court of Texas in *Schiller v. Elick*.¹²¹ Mr. Schiller had taken ill and he and his wife decided to sell their farm. Mrs. Schiller was of German descent and spoke only broken English. Elick, an employee of the Federal Land Bank, was an acquaintance of the Schillers and an occasional visitor to their home. At the Schillers' request, Elick found a buyer who, according to Elick, wanted to finance the purchase with a Federal Land Bank loan. Elick misrepresented to the Schillers that the Federal Land Bank would not make the loan unless the borrower obtained at least one-half of the mineral interest in the property. He persuaded the Schillers to convey to him title to the property with half the mineral interest. Elick then conveyed the property and one-fourth on the mineral interest to the buyer and, without the knowledge of the Schillers, retained a one-fourth mineral interest for himself. Upon discovering the facts, the Schillers brought action against Elick and the trial court gave judgment in their favor, imposing a constructive trust on the mineral interest retained by Elick and granting money damages for the one-quarter interest conveyed to the buyer.¹²²

In affirming the judgment, the Supreme Court of Texas reasoned that

121. 240 S.W.2d 997 (Tex. 1951).

122. Although the court does not discuss the matter, the damage calculation was correct only if the buyer did not pay and the Schillers did not receive fair value for the one-quarter mineral interest sold.

the trial court properly made an “implied finding”¹²³ of fraud and breach of a fiduciary relationship by Elick. That there was fraud and that a constructive trust was the proper remedy for that fraud is clear. However, the only prior relationship between the parties referred to by the court was that Elick was an acquaintance of the Schillers and an occasional visitor to their home. That kind of relationship, of course, in no way justifies the existence of the trust and confidence necessary to establish a confidential relationship. The court, however, concluded to the contrary, reasoning that a confidential relationship may be found whenever there is an “overreaching made possible by a misplaced confidence.”¹²⁴ This extraordinarily broad language, taken literally, would completely obscure any distinction between fraud and the breach of a confidential relationship and would, in essence, make both concepts identical. Certainly a “misplaced confidence” is a core element of both, but it is only one element of each. In *Schiller*, all the necessary elements for fraud were clearly present. However, the additional elements for a confidential relationship were not. The “misplaced confidence” would indicate, without more, only a subjective trust of the Schillers in Elick, and the overwhelming weight of authority is that a mere subjective trust will not establish a confidential relationship. The only issue before the court was whether parol evidence could be admitted to establish Elick’s wrongdoing. Evidence of fraud would not be barred by the rule, and the court’s finding of a confidential relationship was thus both unwarranted and unnecessary.¹²⁵

The tension between the established rule that evidence of fraud is not barred by the parol evidence rule and the equally fundamental rule that a fraud claim fails where the true facts are obvious or readily discoverable has caused many courts to rely on the concept of confidential relationship to excuse a claimant’s failure to discover the falsity of fraudulent assertions by neglecting to read the written contract that she seeks to avoid. On the one hand, one is bound by the obligations in a written contract once it is signed; on the other, the writing should not establish a safe harbor with provisions that would belie the fraudulent assertions. Where the fraud would be readily discoverable from the writing, which should prevail, the so-called duty to read or the defense of fraud in the induce-

123. *Schiller*, 240 S.W.2d at 998.

124. *Id.* at 1000.

125. See, e.g., *Ward v. Taggart*, 336 P.2d 534 (Cal. 1959), wherein the court on facts similar to those in *Schiller* allowed the plaintiff recovery against the defendant for compensatory and punitive damages on theories of fraud and unjust enrichment. Taggart had fraudulently represented to Ward that he was the exclusive agent for Sunset for the sale of certain real estate that Ward was interested in purchasing. Ward submitted through an agent an offer to purchase the property for \$4000 an acre. Taggart misrepresented to Ward that he had submitted the offer and that Sunset would only sell further for \$5000 an acre. Ward agreed to pay the \$5000, and Taggart purchased the property himself from Sunset for \$4000, sold it to Ward for \$5000, and pocketed the additional \$1000 per acre. In allowing the recovery, the court reasoned, *inter alia*, that Taggart’s fraudulent misrepresentations made him an involuntary trustee for Ward for the amount of the secret profit he had received.

ment? Many courts leave resolution of the dilemma to the jury and allow the claimant to proceed with the heavy burden of persuasion that she was induced into the contract by assurances that are directly contradicted by the signed writing.¹²⁶

Other courts are more reluctant, evidencing a lesser trust of juries and a greater reverence for the parol evidence rule, and require justifiable reason for the claimant's reliance on the oral misrepresentation rather than on the contrary, truthful written representation. Where the contradiction is not direct, that reason can be found by construing the writing as reasonably consistent with the alleged misrepresentation.¹²⁷ Where the conflict is direct, the courts occasionally resort to a quite liberal concept of a confidential relationship to justify the claimant's failure to read and her reliance on the fraudulent misrepresentation. It is in the business relationship cases that this relaxed attitude toward confidential relationships is most apparent because these cases directly contradict the basic assumption, not characteristic of familial and friendship cases, that a business relationship will not give rise to a confidential one. Indeed, it is in these cases that exceptions will be found to the long lines of judicial decisions holding that relationships such as employer/employee and creditor/debtor are not confidential ones.¹²⁸

This relaxed attitude is understandable, even laudable. The only legal maxim being violated is a flawed notion of a duty to read,¹²⁹ and the only

126. Professor Murray trenchantly states the matter as follows:

Where the offeror has misrepresented the contents of the writing and the offeree relies upon the misrepresentation without reading the document before signing it, courts are confronted with the fraud of one party versus the negligence of the other. While some older cases may be found holding the offeree negligent notwithstanding the fraud of the offeror, the clearly prevailing position is effectively suggested by a Kentucky court: "Is it better to encourage negligence in the foolish, or fraud in the deceitful?" Either course has obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice.

JOHN E. MURRAY, *MURRAY ON CONTRACTS* § 91, at 444 (3d ed. 1990), quoting *Western Mfg. Co. v. Cotton & Long*, 104 S.W. 758, 760 (Ky. 1907).

127. See *Northwestern Bank v. Roseman*, 344 S.E.2d 120, 124 (N.C. 1986) (whether party who failed to read the document was reasonable in relying on the misrepresentation by other party is a question of fact). There is a minority view, held by a few courts, that the parol evidence rule bars extrinsic evidence of promissory fraud, apparently to discourage parties from alleging that every broken promise constitutes fraud. See E. ALLAN FARNSWORTH, *CONTRACTS* § 7.4, at 483 (2d ed. 1990). This minority view is discussed in Justin Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CAL. L. REV. 877 (1961).

128. See *supra* note 103.

129. No one seriously suggests either that this duty to read actually reflects the normal human practice or even that it has the potential to channel human conduct in that direction. The unarguable fact is that people, as a rule, do not, and never will, read most contracts they sign. For an early statement of the duty, see *Sanger v. Dunn*, 3 N.W. 388, 389 (Wis. 1879) ("It will not do for a man to enter into a contract, and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained."). Two very useful discussions of the duty can be found in John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341 (1974); Stewart Macaulay, *Private Legislation and the Duty to Read - Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); see also FARNSWORTH, *supra* note 127, at §§ 4:14, 4:26, 7.5 & 7.9.

trust being reposed by the claimant is in the veracity of the fraudfeasor and, thus, the lack of a necessity of performing the often tedious task of reading the document one is about to sign. It would be error, however, to read these cases beyond their facts as representative of the general attitude of the courts toward the parameters of confidential relationships.

For example, in *Sheffield v. Lewis*¹³⁰ the court affirmed the judgment of the trial court canceling a mineral deed that had been procured by the fraudulent misrepresentation that the deed was a lease. The facts indicated that the plaintiff was an ignorant woman, only marginally literate, who lacked knowledge or understanding of oil and gas matters. The defendant was an experienced oil and gas man who procured the deed from the plaintiff by fraudulent misrepresentation and for a grossly inadequate consideration. There was no relationship between the parties prior to the transaction at issue. The defendant asserted that the plaintiff's action was barred by the applicable statute of limitations because the fraud was reasonably discoverable by the plaintiff, presumably by reading the deed itself, more than four years prior to her filing the cause of action.¹³¹ The court rejected this argument, however, reasoning that any discovery of the fraud or inquiry into it was excused by a confidential relationship between plaintiff and defendant because they "were not dealing solely at arm's' length but that a relationship of trust and confidence existed between the parties."¹³² Once again, the court's conclusion is unfortunate in that it merely treats the defendant's fraud as a surrogate for establishing a confidential relationship between the parties and for squaring doctrine with result. And, once again, the court's conclusion is unnecessary, because the fraudulent misrepresentation regarding the meaning and content of a writing, particularly when made to one who is largely illiterate, is in itself sufficient ground for delaying inquiry into the actual meaning of the writing.¹³³

Similarly, in *Fipps v. Stidham*,¹³⁴ the court found that a debtor had alleged sufficient facts to show a confidential relationship with his creditor.

130. 287 S.W.2d 531 (Tex. Civ. App.—Texarkana 1956, no writ).

131. The court noted well established case law to the effect that a grantor is charged with knowledge of the deed. *Id.* at 536.

132. *Id.* at 535.

133. The court's resort to finding a confidential relationship between the parties is made all the more inexplicable by its clear understanding that a fraudulent misrepresentation as to the content of a writing may be relied upon to excuse a further inquiry into the actual content of the writing. In its analysis, the court relied heavily upon and quoted extensively from *Kennedy v. Brown*, 113 S.W.2d 1018 (Tex. Civ. App.—Amarillo 1938, writ denied), in which the court noted that the rule charging a grantor with knowledge of the contents of a deed is usually restricted to cases in which the grantor, rather than the grantee, prepares the deed, and in which the court concluded:

Thus it is clear that in the above cases had the facts shown that the grantees in the deeds involved in those cases had done any act or made statements which would have been sufficient to lull the grantor to sleep, then it seems to us that limitation under the exception set out above would not have begun to run against the grantor until they had [actually] discovered the mistake.

Id. at 1020, quoted in *Sheffield*, 287 S.W.2d at 536.

134. 50 P.2d 680 (Okla. 1935).

The suit was on a renewal note, and the fraud alleged was a failure by the creditor to disclose terms in the new note disadvantageous to the debtor. The renewal note represented a continuance of one of only two transactions, both arm's length loans, in which the parties had previously engaged. Prior to the renewal, which was handled by the original creditor, a bank, the note had been sold to a bank officer, who purchased the note because bank examiners had criticized the underlying loan that the officer had negotiated with the debtor. The purchase of the note by the officer was not disclosed to the debtor by the bank, which the court found treated its affairs and those of its officer interchangeably. The defense to the fraudulent nondisclosure claim was that the debtor should have reasonably discovered the true facts by reading the renewal note, and the court noted that in "a long line of decisions"¹³⁵ it had "steadfastly ruled"¹³⁶ that a failure of a debtor to read a renewal note acted as a waiver of any fraud claim for nondisclosure of the terms of the note. Nevertheless, the court ruled in favor of the debtor because a confidential relationship existed between the bank and the debtor at the time the note was renewed. The bank thus had a duty to disclose that in renewing the note it was acting as an agent for its officer and to disclose payment terms in the note disadvantageous to the debtor. The debtor was a man of little education who was unable to compute the new payment obligations without assistance, and the bank had lulled the debtor into a false sense of security that justified his failure to inquire more closely into the actual facts.

The courts have used the concept of confidential relationship as a surrogate for a technically flawed fraud claim in all types of business relationships including these customarily held not to give rise to trust and confidences. In *Cochran v. Murrah*,¹³⁷ for example, the court upheld the trial court's finding that the plaintiff had alleged sufficient facts to support a confidential relationship with his employer. The suit was to cancel a release signed by the plaintiff and to recover damages for unpaid wages and medical expenses resulting from a work-related accident suffered by the plaintiff. At the time of the signing of the release, the plaintiff had been employed by the defendant for over eight years as a farm laborer. His wages were set at \$70 a week, and he was allowed to live rent-free in a house provided by the employer. However, some weeks he was paid less than \$70. The plaintiff never inquired as to the reason for the lesser payments, but trusted his employer to pay him what was fair. The employer had persuaded the plaintiff to sign the release while he was bedridden from his injuries and under the influence of pain medication. The employer fraudulently represented to the plaintiff that the release obligated the insurance company to continue making payments to him for lost wages and medical bills when in fact the agreement released the em-

135. *Id.* at 683.

136. *Id.*

137. 219 S.E.2d 421 (Ga. 1975).

ployer and the insurance company from all claims arising from the accident. The plaintiff signed the release without reading it and later testified that: "He can read, but never does."¹³⁸ The court held that the plaintiff's uncontroverted allegations were sufficient to establish a confidential relationship between the parties and that the plaintiff was thus justified in relying on the employer's representations rather than reading the document itself. Although the facts in *Cochran* supporting a confidential relationship are stronger than in most of these "failed fraud" cases, most courts would probably find that the plaintiff's infirmity arising from his injuries and the influence of pain medication provided sufficient excuse for his failure to read. This excuse, coupled with the plaintiff's uncontroverted allegations of fraud, would represent an adequate basis for setting aside the release without having the court resort to a finding of a confidential relationship between the parties.

But the lesson is clear. In fraud cases, the courts often equate fraud with breach of a confidential relationship, even in circumstances where the equation is unnecessary because the fraud itself, notwithstanding the absence of a confidential relationship, furnishes the basis for allowing the equitable relief sought. These cases surely intend no marked deviation from the normal assumption that business dealings do not give rise to confidential relationships. They should not be read to send a false signal regarding the parameters of confidential relationships, but must be relegated to their particular facts. In them, the fictitious confidential relationship acts as a disguised and unnecessary surrogate for a technically flawed fraud.

V. AFTERWORD

Conclusion would be folly. Any study of this daunting area of equity will reveal as many questions as answers. Yet surprisingly little has been written about it. Perhaps that is because polycentric legal concepts—and confidential relationship is a quintessential example—defy firm resolution across the broad spectrum. Yet a good amount of synthesis, at the least, is possible.

This much seems clear. When the courts attempt to define confidential relationship, they do so in quite broad terms that capture its flavor without divulging its roux. Their lack of candor is admittedly intentional. The purpose is to leave the doctrine fluid so that it can be tailored to achieve justice in a broad panorama of factual settings. Uncertainty is regarded as a fair price to achieve this end. Nevertheless, the courts have established a few clear principles that provide a sketchy roadmap. The essential element of a confidential relationship is a justifiable reposing of trust by one party in another that the other will treat that party's interests at least on a par with his own. Indeed, a confidential relationship is usually defined simply, and broadly, as one in which one justifiably expects that

138. *Id.* at 421.

the other will care for his interest and welfare. That expectation must not be merely subjective and must arise from circumstances existing prior to the alleged illicit transaction at issue.

If the trust is justifiably reposed, a confidential relationship will arise. However, the expectation that one will place his own interests subservient to those of another is so extraordinary to human nature that it will understandably exist only within special societal relationships. When the societal relationship is one of loving family members or close personal friends, the justification for and reasonableness of reposing trust one in the other is readily understandable. The familial and close personal friendship cases might often have been unpredictable to the lawyers that tried them, and even to the trial judges that heard them, but their ultimate results are usually easy to understand. If the courts were to confine confidential relationship to only those cases, the concept would be far more concrete. It is the extension of the concept into business relationships that causes confusion by sending the false signal that a confidential relationship can arise from virtually any ongoing interaction between people.

Like the wolf at the campfire, confidential relationship has no rightful place within the business setting. The prevailing general rule, stated in innumerable cases, is that a confidential relationship cannot arise from purely business interaction regardless of its constancy and duration. It is a rule rare in the exception if one looks to categories of exception rather than to the large number of cases that fall within the categories. The categories themselves are formed by cases governed by underdeveloped or otherwise flawed legal doctrine. Two principal examples comprise the bulk of the cases, examples I have labeled "near joint ventures" and "failed fraud" claims. Parties to an oral joint venture or partnership, of course, owe fiduciary duties to each other as a matter of law because of their status as partners or joint venturers. In the "near joint venture" cases, one party agrees to hold property or an interest therein, such as a royalty interest, with legal title in his name but with the oral understanding that the property is held for mutual profit and for the use and benefit of both parties. It is unclear in these cases why the oral agreement does not fit within the established definition of an oral partnership or joint venture. In the usual case, the court opines that a joint venture did not exist but does not explain the reason for its conclusion. However, based upon similar past transactions between the parties, the court concludes instead that a confidential relationship existed between the parties that justified the claimant's trust that the other would honor the oral promise. The refusal simply to find in favor of joint venture is baffling. The use of confidential relationship as a surrogate for joint venture is confusing.

In the "failed fraud" cases, the defendant's alleged fraud is contradicted by a signed writing. The courts thus face the recurring conundrum of giving full effect to the writing by excluding the contradictory parol evidence at the risk of giving countenance to the defendant's fraud.

Those courts that opt in favor of enforcing the parol evidence rule often strain to find a confidential relationship between the parties, based upon prior business transactions, and then refuse to allow the defendant to shelter behind the rule. It is, of course, perplexing why fraudfeasors are thereby given more favorable treatment than are fiduciaries and why it is not better left to the fact finder to decide the believability of a claim of oral fraud that is contradicted by a writing signed by the claimant.

Although extending the concept of confidential relationship to both these categories of purely business relationships is perhaps unwarranted—refining the flawed legal doctrine being the better approach—if the cases are treated as *sui generis* and confined to their general categories, the concept of confidential relationship remains the province of familial relationships and of those based upon close friendships, and the business relationship that gives rise to the concept becomes an identifiable anomaly. Thereby, the concept of confidential relationship becomes more understandable.

Essays

